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In The Supreme Court of The United States

JUAN JOSE MARTINEZ-MADERA,

Petitioner,

v.

ERIC HOLDER, JR., Attorney General,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Ninth Circuit erred by applying the current version of 8 U.S.C. § 1409, rather than the version in effect at the time of Mr. Martinez-Madera's birth, when it considered whether he derived citizenship from his stepfather.

II. Whether the Ninth Circuit erred when it held that the version of 8 U.S.C. § 1409 applicable to Mr. Martinez-Madera required that there be a blood relationship between the petitioner and the parent from whom he asserts derivative citizenship.

III. Whether the Ninth Circuit engaged in judicial legislation when it inserted into 8 U.S.C. § 1401(a)(7) a requirement that, in order for a child to derive citizenship from a stepparent, the stepparent must be married to the child's biological parent at the time of the child's birth.

IV. Whether the Ninth Circuit erred when it failed to follow decisions of the California Supreme Court holding that a child can be legitimated by a non-biological father.

V. Whether the Ninth Circuit's denial of citizenship on the sole ground that his stepfather and mother were not married at the time of his birth is inconsistent with immigration jurisprudence and public policy, which supports keeping families, such as Mr. Martinez-Madera's together.

PARTIES TO THE PROCEEDING

The parties to the proceeding are Petitioner Juan Jose Martinez-Madera ("Petitioner" or "Mr. Martinez-Madera") and Respondent Eric Holder, Jr., Attorney General.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Juan Jose Martinez-Madera respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion (the "Decision") of the United State Court of Appeals for the Ninth Circuit (the "Court of Appeals") was entered on March 16, 2009, under the caption *Martinez-Madera v. Holder*, No. 06-73157 (9th Cir. 2009), reported at 559 F.3d 937. A copy of the Decision is in the Appendix at A-1. Petitioner filed a timely Petition for Rehearing by Panel and Suggestion for Rehearing *En Banc* on May 14, 2009. Both petitions were denied by order dated June 18, 2009. A copy of the Order is in the Appendix at A-48.

JURISDICTION

The judgment of the Court of Appeals was entered on March 16, 2009. The Court of Appeals had jurisdiction over this matter under 8 U.S.C. Section 1252(b)(5)(A) as there had been a final adjudication on the merits by the Board of Immigration Appeals on May 30, 2006 (a copy of this final adjudication can be found in the Appendix at A-24). The Decision was entered on March 16, 2009, under the caption *Martinez-Madera v. Holder*, No. 06-73157 (9th Cir. 2009), reported at 559 F.3d 937. Petitioner filed a timely Petition for Rehearing by Panel and Suggestion for Rehearing *En Banc* (the

"Petition for Rehearing") on May 14, 2009. Both petitions were denied by order dated June 18, 2009.

This Petition for Writ of Certiorari has been filed and docketed within the time limits prescribed by 28 U.S.C. Section 2101(c) as it was filed on September 15, 2009, which is within 90 days of June 18, 2009, the date of entry of the order denying Petitioner's Petition for Rehearing. Thus, the jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The version of Section 301(a) of the Immigration and Nationality Act (the "INA") in effect in 1953 (codified as 8 U.S.C. § 1401(a)(7) (1952)) provided, in relevant part:

> (a) The following shall be nationals and citizens of the United States at birth:
>
> * * *
>
> (7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten

> years, at least five of which were after attaining the age of fourteen years:...

8 U.S.C. § 1401(g) (2009) (last amended in 1994), provides, in relevant part:

> The following shall be nationals and citizens of the United States at birth:
>
> * * *
>
> (g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years...

INA § 309 (1953) (codified at 8 U.S.C. § 1409(1952)) provides, in relevant part:

> (a) The provisions of paragraphs (3), (4), (5), and (7) of section 301 (a), and of paragraph (2) of section 308, of this title shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this Act, if the paternity of such child is established while such child under the age of twenty-one years by legitimation.

8 U.S.C. § 1409 (2009) (last amended in 1988) provides, in relevant part:

> Children born out of wedlock
>
> (a) The provisions of paragraphs (c), (d), (e), and (g) of section 301 [8 USCS § 1401(c)-(e), (g)], and of paragraph (2) of section 308 [8 USCS § 1408(2)], shall apply as of the date of birth to a person born out of wedlock if—
>
> (1) a blood relationship between the person and the father is established by clear and convincing evidence,
>
> (2) the father had the nationality of the United States at the time of the person's birth,
>
> (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
>
> (4) while the person is under the age of 18 years—
>
> (A) the person is legitimated under the law of the person's residence or domicile,

Cal. Civ. Code § 230, stats 1975, ch. 1244 § 8 (repealed 1975) provides:

> Adoption of an illegitimate child. The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption.

Cal. Fam. Code § 7611(d) (2009) provides, in relevant part:

> A man is presumed to be the natural father of a child if he meets the conditions provided in Chapter 1 (commencing with Section 7540) or Chapter 3 (commencing with Section 7570) of Part 2 or in any of the following subdivisions:
>
> * * *
>
> (d) He receives the child into his home and openly holds out the child as his natural child.

REASONS FOR GRANTING THE WRIT

The writ should be granted on the following grounds:

1. The Court of Appeals overstepped its bounds and indulged in judicial legislation by inserting a blood relationship requirement that Congress had declined to include in the pre-1986 version of 8 U.S.C. § 1409. The Court of Appeals erred by applying the current version of 8 U.S.C. § 1409, rather than the version in effect at the time of Petitioner's birth, to determine if he derived citizenship from his stepfather. While the current version of 8 U.S.C. § 1409 requires a blood relationship between the child and its citizen parent, the version in effect when Petitioner was born in 1953 did not. Thus, the application of the wrong version of 8 U.S.C. § 1409 resulted in the Court of Appeals reading a blood relationship requirement into the federal statute where one did not exist.

2. The Court of Appeals engaged in judicial legislation when it inserted into 8 U.S.C. § 1401(a)(7) a requirement that, in order for a child to derive citizenship from a stepparent, the stepparent must be married to the child's biological parent at the time of the child's birth.

3. The Court of Appeals failed to follow applicable California state law as articulated by the California Supreme Court when it held that, under California law, a child cannot be legitimated by a non-biological father. The Decision directly contradicts the Supreme Court of California's

holding that a non-biological father's claim of paternity can prevail over the opposing claim of the biological father.

4. The Court of Appeals erred by applying Cal Civ. Code. §230 to determine whether Petitioner was legitimized under California law. Section 230 was repealed in 1975 in favor of the Uniform Parentage Act ("UPA"), Cal. Fam. Code §§ 7000, *et seq*. California courts have applied the UPA retroactively to persons born prior to its enactment and have consistently held that a non-biological father that meets the explicit requirements of Cal. Fam. Code § 7611(d) will be deemed the child's father even in the face of uncontroverted evidence that another man is the biological father.

5. The Court of Appeals erred by affording deference to the BIA's decision dismissing Petitioner's appeal pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Chevron* deference is not due where, as here, the BIA decided questions of law related to nationality. Congress has explicitly placed nationality claims solely in the hands of the courts, and, accordingly, the Court of Appeals should have reviewed Petitioner's petition *de novo*.

6. Both the legislative history and the humane purpose and goals of the INA favor keeping the children of immigrants and United States citizens, such as Mr. Martinez-Madera, united with their families. The Court of Appeals' errant Decision stands squarely in opposition to these goals and must be corrected.

STATEMENT OF THE CASE

On October 25, 1996, in the Superior Court of California, County of Santa Clara, Petitioner entered a plea of *nolo contendere* to the offense of attempted murder. Subsequently, Petitioner moved the court to withdraw his plea, but his motion was denied. As a result, Petitioner served a criminal sentence until September 22, 2005.

On September 8, 2005, approximately nine years after Petitioner's 1996 plea of nolo contendere and only two weeks before his September 22, 2005 scheduled release date, the United States Department of Justice, via the then-Immigration and Naturalization Service ("INS"), commenced the removal proceedings that give rise to this Petition for Writ of Certiorari. In connection with those proceedings, Petitioner was released to the custody of Immigration and Customs Enforcement, where he remained confined until the resolution of the appeal.

Between September 28, 2005 and February 21, 2006, Petitioner appeared *pro se* in three removal proceeding hearings before Immigration Judge Dennis R. James (hereinafter, the "IJ"). At the final hearing, on February 21, 2006, the IJ issued an oral decision finding that Petitioner did not derive citizenship from his stepfather, Jesus Gonzalez, because they did not share a biological relationship, and, accordingly, that Petitioner was not a United States citizen. Based on this finding and Petitioner's 1996 plea of *nolo contendere*, the IJ found Petitioner subject to removal and ineligible for relief. On the same day, the IJ issued a written order, ordering

Petitioner removed from the United States to Mexico. The IJ based this order on: (i) the finding that Petitioner was not a United States citizen because "neither of [his] biological parents were [sic] United States citizens at the time [Petitioner] was born," and (ii) the finding that *Scales v. INS*, 232 F.3d 1159, 1162 (9th Cir. 2000) and *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005), in which the Court of Appeals held that a petitioner need not establish a blood relationship with a United States citizen to derive citizenship, were distinguishable because the "reviewing court found that those children were not born out of wedlock." A copy of the oral decision can be found in the Appendix at A-33, and a copy of the written order can be found in the Appendix at A-30.

On March 7, 2006, Petitioner filed a Notice of Appeal to the BIA. In his appeal to the BIA, Petitioner again proceeded *pro se*. On May 30, 2006, the BIA affirmed the decision of the IJ, including the IJ's rationale, and dismissed Petitioner's appeal. The BIA found that Petitioner was born out of wedlock because he was not born during an "existing marital relationship," and as such, that Petitioner could not derive citizenship from Mr. Gonzalez with whom he shared no blood relationship.

On March 16, 2009, Petitioner filed a Petition for Review of the BIA's decision. The Court of Appeals denied Petitioner's Petition for Review, holding that 8 U.S.C. § 1401(g) requires at least one of an unnaturalized petitioner's parents to be married to a U.S. citizen at the time of petitioner's birth in order to obtain derivative citizenship and,

because Petitioner's mother married his U.S. citizen stepfather *after* Petitioner's birth, Petitioner could not obtain derivative citizenship from his U.S. citizen stepfather.

On May 14, 2009, Petitioner filed a Petition for Rehearing by Panel and Suggestion for Rehearing *En Banc*. On June 16, 2009, the Court of Appeals entered an order denying both petitions.

STATEMENT OF FACTS

Petitioner Juan Jose Martinez-Madera has been living in California since 1965. Petitioner was born in Mexico on January 27, 1953, but has spent his entire adult life in the United States and does not even remember his short time in Mexico. His mother, Tomasa Madera, was also born in Mexico but became a citizen of the United States in approximately 1981. Petitioner's mother was not married to, and Petitioner never knew, his biological father, apparently a citizen of Mexico. In 1960, Petitioner's mother did marry Jesus Gonzalez, a U.S. citizen who raised Petitioner and is the only father Petitioner has ever known.

For as long as Petitioner can remember he has been part of a large, loving family headed by his biological mother and Mr. Gonzalez. When Petitioner was only six months old, his mother began a relationship and family with Mr. Gonzalez, who was born in California in 1928. Mr. Gonzalez was present in the United States for at least ten years before the birth of Petitioner, at least five of which were after attaining the age of fourteen years. From

1954 to 1966, the couple had six other children, marrying in 1960.

On December 22, 1965, when Petitioner was twelve years old, the entire family moved permanently to California, whereupon Petitioner was officially designated a "permanent resident." Throughout his entire childhood, he and his mother and siblings lived as a family unit with Mr. Gonzalez, who has provided for the entire family and publicly held himself out as Petitioner's father. The facts are undisputed that,

> since [Martinez-Madera]'s age of 6 months Mr. Gonzales . . . has held out that [Martinez-Madera] is to be his son and addresses him and adopted him into the family. . . . He has always held [Martinez-Madera] out to be a son and part of the family.

Appendix at 16-17.

Petitioner has long been a hardworking, upstanding member of his community, the State of California, and the United States, with close ties to the same. Petitioner has considered himself an American for as long as he can remember. He is a skilled tradesman who worked continuously at the same company, F.M.C. Corporation of San Jose, California, for approximately sixteen years.

Moreover, even after confinement, Petitioner maintained his "honesty and good work ethic," earned a "high level of respect by both staff and his

peers," and even a commendation from his supervisor. He "displayed a positive attitude with his supervisor and co-workers" and was promoted to the position of lead scale-man. Further, Petitioner participated in an Inmate Employability Program, in which he received Certificates of Achievement in a number of categories, including decision making, problem solving, and communication.

For nine long years, Petitioner awaited his freedom in prison, working hard, keeping a positive attitude, and participating in rehabilitative programs designed to facilitate his transition back into his California community. Until just days before his release date, Petitioner was unaware that the United States Government would attempt to remove him from the United States. Pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii), the Government initiated removal proceedings and confined Petitioner in the El Centro Correctional Facility in El Centro, California until his deportation, despite his claim of United States citizenship. Petitioner is currently residing in Mexico with distant relatives, waiting to be reunited with his family.

ARGUMENT

I. UNDER THE APPLICABLE PROVISIONS OF THE INA IN EFFECT AT THE TIME OF MR. MARTINEZ-MADERA'S BIRTH, HE COULD DERIVE CITIZENSHIP THROUGH LEGITIMATION BY A STEPPARENT IN ACCORDANCE WITH THE LAW OF HIS STATE OF DOMICILE.

Mr. Martinez-Madera's claim to citizenship is governed by the following three statutes that were in effect at the time of his birth: First, Section 301(a)(7) of the INA (codified at 8 U.S.C. § 1401(1952)) provides that a child born abroad to married parents, one of whom is a United States citizen, derives his United States' citizen father's citizenship if the father meets certain residency requirements. Section 309 of the INA (codified at 8 U.S.C. § 1409 (1952)) then applies this rule to illegitimate children, such that an illegitimate child becomes a United States citizen, as of the date of the child's birth, provided the "paternity of such child is established while such child is under the age of twenty-one years by legitimation." Lastly, 8 U.S.C. § 1101(c) (1952) provides that the term "child" in 8 U.S.C. § 1409 (1952) "includes a child legitimated under the law of the child's residence or domicile, whether in the United States or elsewhere."

At Petitioner's birth on January 27, 1953, the version of Section 301 of the INA that was in effect (codified as 8 U.S.C. § 1401(a)(7) (1952)) provided, in relevant part:

> (a) The following shall be nationals and citizens of the United States at birth:
>
> * * *
>
> (7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years:...

The version of Section 309 of the INA that was in effect in 1953 provided, in relevant part, that:

> (a) The provisions of paragraphs (3), (4), (5), and (7) of section 301 (a), and of paragraph (2) of section 308, of this title shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this Act, *if the paternity of such child is established while such child is under the age of twenty-one years by legitimation.*

INA § 309 (emphasis added). Section 309 is a prophylactic provision which, when satisfied, results in the child being deemed in compliance with Section 309(a)(7) at the time of the child's birth. Thus, the versions of Sections 301 and 309 in effect at the time

of Mr. Martinez-Madera's birth worked in conjunction such that, if paternity was established by legitimation pursuant to Section 309(a), then the child derived citizenship from the legitimating parent pursuant to Section 301(a)(7).

At the time of Mr. Martinez-Madera's birth, none of the applicable statutes required that there be a blood relationship between the father and the child. Rather, the child only needed to establish the father's paternity through legitimation. Because Congress expressly directed in 8 U.S.C. § 1101(c) that legitimation be determined by the law of the child's state of domicile, and because Mr. Martinez-Madera was domiciled in California, whether Mr. Martinez-Madera derived citizenship from his stepfather turns on whether California legitimation law allows for legitimation by non-biological parents and whether, in fact, Mr. Martinez-Madera established compliance with such law.

II. BY APPLYING THE CURRENT VERSION OF SECTION 309 OF THE INA TO PETITIONER'S PETITION, RATHER THAN THE VERSION IN EFFECT AT THE TIME OF HIS BIRTH, THE COURT OF APPEALS IMPOSED A BLOOD RELATIONSHIP REQUIREMENT WHERE NONE EXISTED IN THE APPLICABLE STATUTE.

The Decision should be reversed because it applied the current version of Section 309 of the INA to Petitioner's petition for review. Unlike the version in effect at the time of Mr. Martinez-

Madera's birth, the current version expressly requires a blood relationship where citizenship is being derived via legitimation. The Court of Appeals should have applied the version of Section 309 in effect at the time of his birth, which does *not* require a blood relationship between a petitioner and citizen parent. The applicable law for transmitting citizenship to a child "is the statute that was in effect at the time of the child's birth." *United States v. Viramontes-Alvarado*, 149 F.3d 912, 915 (9th Cir. 1998) (internal citations omitted). As a result of its reliance on the wrong version of Section 1409(a), the Court of Appeals reached the erroneous conclusion that Petitioner's "path to citizenship ... require[s] a blood relationship between Petitioner and Gonzalez." *Martinez-Madera v. Holder*, 559 F.3d 937, 942 (9th Cir. 2009).

The blood requirement was not imposed by Congress until 1986. In 1986, Congress amended Section 309 of the INA (then codified as 8 U.S.C. § 1409(a)) to require that a child born out of wedlock have a "blood relationship" to the father in order to establish citizenship. The amended version of 8 U.S.C. § 1409(a) provides, in relevant part:

> (a) The provisions of paragraphs (c), (d), (e), and (g) of section 301 [8 USC § 1401(c)-(e),(g)] ... shall apply as of the date of birth to a person born out of wedlock if—
>
> > (1) *a blood relationship between the person and the father is*

> *established by clear and convincing evidence,*
>
> . . . and
>
> (4) while the person is under the age of 18 years—
>
> > (A) the person is legitimated under the law of the person's residence or domicile,
> >
> > (B the father acknowledges paternity of the person in writing under oath, or
> >
> > (C) the paternity of the person is established by adjudication of a competent court.

8 U.S.C. § 1409(a) (last amended in 1988) (emphasis added). By that amendment, Congress acknowledged that, prior to 1986, there was no blood relationship requirement in Section 1409(a); had Congress intended to include such a requirement prior to the 1986 amendment, it could have done so.

Thus, in *Miller v. Albright*, 523 U.S. 420 (1998), the Supreme Court explained that the purpose of the 1986 amendment to Section 1409(a) was "to ensure that a person born out of wedlock ... actually shares a blood relationship with an American citizen." 523 U.S. at 435. Such insurance was only necessary because the pre-1986 version of Section 1409(a) did not require a blood relationship.

The *Miller* Court acknowledged that in contrast to the "immediately obvious" blood relationship between child and mother, the relationship between an out-of-wedlock child and citizen father may be "undisclosed and unrecorded." *Id.* at 436. Therefore, the *Miller* Court explained, legitimation was the only means of establishing paternity under the as-enacted version of Section 1409(a) insofar as legitimation is the "rough equivalent" of blood relationship evidence:

> As originally enacted in 1952, § 1409(a) required simply that "the paternity of such child [born out of wedlock] is established while such child is under the age of twenty-one years by legitimation." The section offered no other means of proving a biological relationship.... The 1986 amendment [to § 1409(a)] also added § 1409(a)(1), which requires paternity to be established by clear and convincing evidence, in order to deter fraudulent claims; but that standard of proof was viewed as an ancillary measure, not a replacement for proof of paternity by legitimation or a formal alternative.

Id. at 435-36 (emphasis added).[1]

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[1] Likewise, in *Kaliski v. Dist. Dir. of INS*, 620 F.2d 214 (9th Cir. 1980), the Ninth Circuit discussed age limits pertaining to legitimation requirements as a means of preventing fraudulent parent-child relationships: "Without the limitation, persons of any age could enter the United States by being 'legitimated' by

To read a "blood relationship" into the 1953 version of Section 1409(a) would render impotent the legitimation laws incorporated into the statutory scheme. As the *Miller* Court explained, paternity under Section 1409(a), as originally enacted, was established only by legitimacy. *See id.* at 435-36; 8 U.S.C. § 1409(a) (1952) (providing that "legitimation" under the law of the state of foreign domicile "establish[es]" "paternity" for purposes of Section 1409). Legitimacy under Section 1409(a) was, in turn, determined by "the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere ...." 8 U.S.C. § 1101(c)(1) (1952).

Finally, the Court of Appeals' insertion of a blood requirement into the 1953 version is inconsistent with the statutory definitions of "father" and "child" in Section 1101. 8 U.S.C. § 1101(b) and (c). Section 1101(c)(1) defines a "child" as:

> [A]n unmarried person under twenty-one years of age and includes a *child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile*, whether in the United States or elsewhere. . .

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bogus parents, thereby encouraging the kind of immigrant traffic now prevalent because of sham marriages between American citizens and foreigners." *Id.* at 217. Had the pre-1986 version of Section 1409(a) – the version applicable to Petitioner's petition – required a blood relationship, the *Kaliski* court would have had no cause for concern about such "bogus parents."

8 U.S.C. § 1101(c)(1) (emphasis added).

Elevating its own definition of "born...of parents" in Petitioner's case above Congress' express will, the Court of Appeals erred in finding itself "hard-pressed," *Martinez-Madera*, 559 F.3d at 942, to conform to Congress' express definitions of "legitimation," "child" and "father" and its own binding decisions in *Scales* and *Solis-Espinoza*. *See Burgess v. United States*, 128 S. Ct. 1572, 1577 (2008) ("As a rule, [a] definition which declares what a term 'means' . . . excludes any meaning that is not stated" (internal citations omitted)).

III. THE COURT OF APPEALS HAS WRITTEN INTO 8 U.S.C. § 1401 A "MARRIAGE AT BIRTH" REQUIREMENT THAT IS ARBITRARY AND INCONSISTENT WITH THE LANGUAGE OF THE STATUTE.

Even if the current versions of INA 301 and 309 were controlling, the Decision should be reversed. The Decision legislates a "marriage at birth" requirement that is arbitrary and inconsistent with the language of Section 301(a) of the INA. In *Scales*, 232 F.3d 1159, and *Solis-Espinoza*, 401 F.3d 1090, the Ninth Circuit held that where, as in Mr. Martinez-Madera's case, a child is legitimated by his citizen stepparent, the child derives citizenship pursuant to Section 301(a) of the INA even though both of the child's biological parents are aliens. *See Scales*, 232 F.3d a 1166 (finding that child conceived out of wedlock by two alien biological parents derived citizenship from stepmother who was U.S.

citizen and raised him from infancy); *Solis-Espinoza*, 401 F.3d at 1090 (same as to deriving citizenship from stepmother). Indeed, in *Solis-Espinoza*, the petitioner was found to have derived citizenship from his stepparent via legitimation under the same California statute at issue in this case. *See Solis-Espinoza*, 401 F.3d at 1093-94 (finding child derived citizenship via legitimation under Cal. Civ. Code § 230).

Despite this controlling precedent, the Court of Appeals rejected Mr. Martinez-Madera's claim of derivative citizenship through his stepfather for the sole reason that, unlike in *Scales* and *Solis-Espinoza*, Mr. Martinez-Madera's mother was not married to his stepfather when he was born. *Martinez-Madera*, 559 F.3d at 941. The fact that the stepparent was married to the child's biological parent in *Scales* and *Solis-Espinoza* was irrelevant to the analysis underlying those decisions. The Decision in this case elevating this mere fact to an outcome-determinative rule effectively legislates a "marriage at birth" requirement that finds no support in the text of, nor the principles and policies underlying, the INA.

The version of Section 301 of the INA applicable in *Scales* and *Solis-Espinoza*[2] provided that a person

> *born* outside the geographical limits of the United States and its outlying

[2] The Petitioners in *Scales* and *Solis-Espinoza* were born in 1977 and 1967, respectively.

> possessions *of parents* one of whom is an alien, and the other a citizen of the United States . . . is a citizen of the United States if the United States citizen parent meets certain residency requirements.

8 U.S.C. § 1401(a)(7) (1964) (emphasis added). In both cases, the Court of Appeals held that the "born . . . of parents" language in 8 U.S.C. § 1401(a)(7) could be satisfied by establishing that the petitioner was "born in wedlock" and that a child legitimated under the state law of the family's domicile was retrospectively deemed "born in wedlock." *Scales*, 232 F.3d at 1163; *Solis-Espinoza*, 401 F.3d at 1094. *See also Martinez-Madera*, 559 F.3d at 943-44 (Thomas, J. dissenting).

In *Scales*, the petitioner's biological mother, a Philippine citizen, married the petitioner's stepfather, an American citizen, less than one month before giving birth to petitioner. At the time she met petitioner's stepfather, petitioner's mother informed him that she was pregnant with petitioner and that petitioner had been conceived during a prior relationship with another man. The petitioner's stepfather treated the petitioner as his own son at all times. Despite his stepfather's affidavit of non-paternity and the petitioner's admission in his deportation hearing that he was a Philippine citizen, the Ninth Circuit concluded that the petitioner was legitimated by, and thereby derived citizenship from, his stepfather.

As Judge Thomas explained in his dissent to the Decision in Mr. Martinez-Madera's case, in *Scales*, the Ninth Circuit "observed that § 1401 applies if the person claiming citizenship was born 'in wedlock,' while § 1409 applies if the person was born 'out of wedlock.'" *Martinez-Madera*, 559 F.3d at 943. Thus, the court proceeded to determine whether the petitioner was born in or out of wedlock. *Id.* To make this determination, the court looked to the state legitimation law of the petitioner's domicile. *Id.* The court noted that the petitioner and his family had resided in the state of Washington since the petitioner was 11 years old and that Washington state law provided at the time that "[a] man is presumed to be the natural father of a child if: (a) He and the child's natural mother are or have been married to each other and the child is born during the marriage." *Scales*, 232 F.3d at 1163 n.7 (*quoting* Wash. Rev. Code § 26.26.040(1)(a)). Applying this law, the Ninth Circuit concluded that the petitioner "is 'legitimate' by virtue of his parents being married at the time of his birth," and held "that Petitioner acquired citizenship at birth under § 1401." *Id.* at 1164, 1166. The presence of a marriage at birth was relevant to the analysis in *Scales* only because it was a prerequisite to legitimation under the Washington legitimation statute at issue. If a marriage at birth was the determinative factor, there would have been no reason to assess whether Petitioner has been legitimated under the Washington legitimation statute.

In *Solis-Espinoza*, 401 F.3d 1090, the Ninth Circuit clarified that the "born . . . of parents"

requirement of section 1401(a)(7) could be satisfied by establishing that a petitioner was legitimated and, thus, was retrospectively deemed "born in wedlock." At the time of Solis-Espinoza's birth in Mexico, his biological father, who was not a United States citizen, was married to a woman who was a United States citizen but who was not Solis-Espinoza's biological mother. *Id.* at 1091-92. Solis-Espinoza's biological mother, who was not a United States citizen, abandoned him. *Id.* Solis-Espinoza's stepmother accepted him as her own child and, together with his biological father, raised him to adulthood as part of their family. *Id.* at 1091.

In *Solis-Espinoza,* the petitioner was domiciled in California (as in this case) and, thus, the law of California controlled legitimation. 401 F.3d at 1094. Under California law, marriage at birth was not required for legitimation, and, thus, was irrelevant to the analysis. Instead, the Ninth Circuit held that the petitioner met the "born . . . of parents" requirement in 8 U.S.C. § 1401(a)(7) by complying with California's state legitimation statute, Cal. Civ. Code § 230.[3] Because the petitioner complied with the requirements of California's legitimation statute, he was retrospectively deemed "born in wedlock":

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[3] Cal. Civ. Code § 230 provides: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth."

> There appears to be no dispute that petitioner was acknowledged by Solis and was accepted into and raised as a member of the Solis family, with the consent of Cruz-Dominguez. Under the law of California at the relevant time, therefore, Solis-Espinoza was "for all purposes legitimate" from the time of his birth.

Solis-Espinoza, 401 F.3d at 1094.

Thus, whether or not a child derives citizenship from his stepparent depends on whether he has been legitimated under state law, not whether his citizen stepparent was married to his biological parent at the time of birth. The Court of Appeals' improper reliance on the absence of a marriage at birth rather than compliance with the state's legitimation statute directly conflicts with the Court of Appeals' prior precedent in *Scales* and *Solis-Espinoza* and finds no support in the language of 8 U.S.C. § 1401.

IV. THE FIFTH CIRCUIT'S DECISION IN *MARQUEZ-MARQUEZ V. GONZALES* PROVIDES NO SUPPORT FOR A "MARRIAGE AT BIRTH" REQUIREMENT BECAUSE THAT CASE CONSIDERED WHETHER CITZENSHIP COULD BE DERIVED FROM A STEPPARENT THROUGH ADOPTION RATHER THAN LEGITIMATION.

The Court of Appeals' creation of a "marriage at birth" requirement was based in large part on the Fifth Circuit's decision in *Marquez-Marquez v. Gonzales*, 455 F.3d 548 (5th Cir. 2006). The Court of Appeals' reliance on *Marquez-Marquez* was misplaced because *Marquez-Marquez* considered the effect of adoption, not legitimation, and, furthermore, such reliance is inconsistent with the policies underlying Federal immigration jurisprudence.

In *Marquez-Marquez*, the Fifth Circuit considered whether a woman born in Mexico to two unmarried Mexican citizens derived citizenship when she was adopted by her citizen stepfather. *Id.* at 549. She contended that, based on her adoption by a U.S. citizen, she qualified for citizenship under INA § 301(g) (codified at 8 U.S.C. 1401(g)) because she was "born . . . of parents one of whom is . . . a citizen of the United States." *Id.* at 555. The Fifth Circuit concluded that she did not derive citizenship based on her adoption by her stepfather because she did not satisfy the condition contained in INA section 301(a)(7) "at birth." *Id.* at 556-567. In its analysis, the Fifth Circuit made clear that it neither adopted

nor rejected the Ninth Circuit's holdings in *Scales* and *Solis-Espinoza* that section 301(g) imposes no blood requirement of a blood relationship to the citizen parent for children born in wedlock. *Id.* at 559.

Marquez-Marquez is distinguishable from Mr. Martinez-Madera's case because the petitioner did not assert that she had been legitimated by her stepfather. Rather, she asserted citizenship based on adoption. *Id.* at 549, 551-52. This distinction is significant because only legitimation requires that the stepfather have publicly acknowledged the alien as his natural child. By contrast, adoption could apply to a child who came into the stepfather's family at a late age and was never treated as a natural child. Moreover, as explained in *Solis-Espinoza*, under INA § 309(a) (codified as 8 U.S.C. § 1409(a)(1952)), a child that is legitimated is retrospectively treated as "born in wedlock." No court has held that INA § 309(a) has a similar retrospective effect on aliens who are adopted by U.S. citizens. Thus, an alien who is adopted by a U.S. citizen does not satisfy the requirement that he be "born . . . of parents one of whom is . . . a citizen of the United States." INA § 301(a)(7).

V. THE COURT OF APPEALS ERRED IN APPLYING CAL. CIV. CODE § 230, WHICH WAS REPEALED IN 1975, TO DETERMINE WHETHER PETITIONER WAS LEGITIMATED.

The Court of Appeals also erred by applying Cal. Civ. Code § 230 to determine whether Petitioner

was legitimated under California law. Section 230 was repealed in 1975 in favor of the Uniform Parentage Act ("UPA"), Cal. Fam. Code §§ 7000, *et seq*. The Court of Appeals should have applied the UPA to determine if Petitioner was legitimated by Mr. Gonzalez.[4]

California courts have applied the UPA retrospectively to parent-child relationships where the child was born before the UPA's enactment. *See, e.g., Griffith v. Gibson*, 142 Cal. Rptr. 176 (Cal. Dist. Ct. App. 1977). In *Griffith*, the California Court of Appeal considered whether a parent possessed visitation rights to an out-of-wedlock child. *Id.* Making reference to "former Section 200 of the Civil Code (repealed by the enactment of the Uniform Parentage Act)," the court affirmed the retrospective application of the UPA, which was enacted in 1975, in finding a parent-child relationship and recognizing visitation rights to a child born *before the law's enactment*. *Id.* at 179. The *Griffith* court went further, noting that the application to the parent-child relationship of a statute amended by the UPA -- in its pre-amendment form -- would negate the "overall purpose" of the UPA, even though the child was born before the UPA's passage. *See id.* at 181. To the extent the standards of legitimacy and presumptions of paternity of repealed Section 230 are inconsistent with the UPA, California jurisprudence requires that Petitioner's legitimacy be determined under the UPA.

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[4] In any event, all ambiguities should be construed in favor of the alien. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

VI. THE COURT OF APPEALS' APPLICATION OF THE PROPER LEGITIMATION STATUTE WOULD RESULT IN PETITIONER'S LEGITIMATION.

The Court of Appeals' application of the proper statute – the UPA as opposed to repealed Section 230 – would result in Petitioner's legitimation by Mr. Gonzalez. The UPA states in relevant part:

> A man is presumed to be the natural father of a child if he meets the conditions provided ... in any of the following subdivisions:
>
> ***
>
> (d) He receives the child into his home and openly holds out the child as his natural child.

Cal. Fam. Code § 7611(d) (1988). California courts have consistently held that a non-biological father, meeting the requirements of Section 7611(d), will benefit from the UPA's presumptions of paternity even in the face of uncontroverted evidence that another man is the biological father. *See, e.g., In re Nicholas H.*, 46 P.3d 932, 937 (Cal. 2002); *In re Kiana A.*, 113 Cal. Rptr. 2d 669, 679 (Cal. Ct. App. 2001) (holding that non-biological father's presumption of paternity is not necessarily rebuttable by the biological father); *Steve W. v. Matthew S.*, 39 Cal. Rptr. 2d 535 (Cal. Ct. App. 1995) (same); *Michael M. v. Giovanna F.*, 7 Cal. Rptr. 2d

460, 467-68 (Cal. Dist. Ct. App. 1992) (same); *Rodney F. v. Karen M.*, 71 Cal. Rptr. 2d 399 (Cal. Dist. Ct. App. 1998) (finding presumption of paternity in favor of non-biological father even where blood tests established 99.5% probability that competing father was child's biological father). Indeed, these presumptions under the UPA are preserved even "at the cost of biological ties," *see In re Nicholas H.*, 46 P.3d at 938, and are buttressed by the State of California's interest in the welfare of the child, the integrity of the family, and the maintenance of extant parent-child relationships.[5] *See, e.g., Elisa B. v. Superior Court*, 117 P.3d 660, 668 (Cal. 2005); *In re Cody B.*, 63 Cal. Rptr. 3d 652, 655 (Cal. Dist. Ct. App. 2007); *In re Salvador M.*, 4 Cal. Rptr. 3d 705, 708 (Cal. Dist. Ct. App. 2003).

In *In re Nicholas H.*, the Supreme Court of California considered the validity of a parental relationship where the man, by his own admission, had no blood relation to the child. *See* 46 P.3d at 936. Noting that the man had lived with the child's mother and provided a home for the mother and child for several years, the court applied Section 7611(d) of the UPA and concluded that the man with no biological relationship nevertheless qualified as the child's presumed natural father. *Id.* at 933-35.

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[5] The State's interest in favoring legitimacy is echoed by the legislative history of the INA. *See* H.R.Rep. No. 85-1199, at 2020 (1957), reprinted in 1957 U.S.C.C.A.N. 2016, 2020 (observing that the "legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united").

The court reasoned that the paternity presumption of Section 7611(d) cannot be rebutted even by an admission of no blood relationship where "no other man claims parental rights to the child [or where] rebuttal of the section 7611(d) presumption will render the child fatherless." *Id.* at 941.

There is no dispute that Mr. Gonzalez meets all the requirements under Section 7611(d): Mr. Gonzalez received Petitioner into his home, openly held Petitioner out as his natural child, and lived with Petitioner, Petitioner's mother, and Petitioner's six citizen siblings as a single family unit throughout Petitioner's childhood. No other man is claiming parental rights over Petitioner, such that a rebuttal of the paternity presumption would render Petitioner fatherless. *See Martinez-Madera*, 559 F.3d at 943-44.

VII. THE COURT OF APPEALS ERRED IN REQUIRING A "BLOOD RELATIONSHIP" UNDER CAL. CIV. CODE § 230.

Even assuming Cal. Civ. Code § 230 governs Petitioner's petition, the Court of Appeals erred in determining that a blood relationship is a prerequisite to legitimation under California law. Section 230 provides that:

> The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it

> were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth....

Cal. Civ. Code § 230 (repealed 1975) (emphasis added). Despite the absence of any express blood requirement, the Court of Appeals imposed one in this case in reliance on dicta in *Blythe v. Ayres*, 31 P. 915 (Cal. 1892), a case decided 117 years ago. *See Martinez-Madera*, 559 F.3d at 942. In *Blythe*, the California Supreme Court did not consider whether a child could be legitimated by a stepparent. Rather, the court sought to determine the relationship between a father and his *biological* daughter with respect to the daughter's inheritance rights. In the course of finding in favor of a legitimate parental relationship, the court commented that Section 230 is a legitimation statute, not an adoption statute and that "[a]doption, properly considered, refers to persons who are strangers in blood; legitimation, to persons where the blood relation exists." *Blythe*, 31 P. at 916.

The Court of Appeals erred by transforming this dicta into a rule that a stepfather cannot legitimate a child under Section 230. *See Martinez-Madera*, 559 F.3d at 942. That "rule" finds no support in *Blythe* or in any case decided since. In fact, *Blythe* dealt solely with a biological parent-child relationship; stepparent legitimation was neither relevant to nor a part of the *Blythe* court's analysis. The same is true in the *Estate of Lund*, the other case cited by the Court of Appeals for this "rule." In *Estate of Lund*, 159 P.2d 643 (Cal. 1945), which

quoted the dicta from *Blythe*, the California Supreme Court considered whether a child, born out of wedlock, could inherit from his *biological* father. Thus, neither of these cases offers any guidance on whether a child can be legitimated by a stepfather.

Aside from being mere dicta, the analysis of *Blythe* is directly contradicted by recent cases holding that the rebuttable presumptions of paternity recognized by Cal. Fam. Code § 7611(d), which does *not* require a blood relationship, also exist in predecessor Section 230, provided the elements of legitimacy are otherwise satisfied.[6] *See, e.g., Griffith*, 142 Cal. Rptr. at 179 (referring to the "rebuttable presumptions of paternity" afforded under Section 230); *United States v. Viramontes-Alvarado*, 149 F.3d 912 (9th Cir. 1998).

Thus, in *Viramontes-Alvarado*, the Ninth Circuit looked to case law interpreting Section 7611 for guidance in applying Cal. Civ. Code § 230 to an individual born in 1962. In doing so, the court noted that though "[Section 7611] replaced [Section 230] in 1975 .... the provisions are substantially the same." *Viramontes-Alvarado*, 149 F.3d at 917 n.3. Thus, just as a blood relationship is not required to establish paternity under Section 7611(d), a blood relationship is not required under the substantially similar provisions of Cal. Civ. Code § 230.

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[6] Cal. Civ. Code § 230, enacted in 1872, was repealed in favor of Cal. Fam. Code § 7004 in 1975, which was in turn recodified into Cal. Fam. Code. § 7611 in 1994.

VIII. PETITIONER MET ALL OF THE REQUIREMENTS FOR LEGITIMATION UNDER THE STATUTE IN EFFECT AT THE TIME OF HIS BIRTH.

Federal courts have consistently held that the legitimation laws must be liberally construed in favor of finding legitimation. *See Kaliski v. Dist. Dir. of INS*, 620 F.2d 214 (9th Cir. 1980) (noting that federal courts dealing with legitimation statute have previously concluded that state policy favors legitimation such that legitimation requirements should be construed broadly and weight should be given to intention to treat child as one's own); *Moreno v. Richardson*, 484 F.2d 899 (9th Cir. 1973); *Rodriguez v. Rodriguez*, 329 F. Supp. 597 (N.D. Cal. 1971).

There is no dispute that Mr. Martinez-Madera met all of the requirements for legitimation under California Civil Code Section 230 by "publicly acknowledging [Petitioner] as his own, receiving [Petitioner] as such, with the consent of his wife, . . . into his family, and otherwise treating [Petitioner] as if [he] were a legitimate child." *See* Cal. Civ. Code § 230. Because the undisputed facts demonstrate that Petitioner was legitimated by his stepfather, a United States citizen, Petitioner was "for all purposes legitimate" from the time of his birth.

IX. THE COURT OF APPEALS ERRED IN GRANTING *CHEVRON* DEFERENCE TO THE BIA'S DISMISSAL OF PETITIONER'S APPEAL FROM A REMOVAL ORDER.

Finally, the Court of Appeals erred in granting deference pursuant to *Chevron U.S.A., Inc.*, 467 U.S. 837, to the BIA's analysis dismissing Petitioner's appeal from a removal order. *See, e.g., Martinez-Madera*, 559 F.3d at 942 ("Furthermore, the [BIA's] determination to this effect is entitled to *Chevron* deference."). It is well-settled that *Chevron* deference only applies when Congress has delegated the authority to the agency to make rules carrying the force of law, and when the agency interpretation benefiting from deference was promulgated in the exercise of that authority. *See U.S. v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). However, it is clear that Congress has *not* granted discretion to the BIA to decide questions of law related to nationality. To the contrary, in the context of an order for removal, which Petitioner challenges in this case, "the [Immigration and Nationalization Act] explicitly places the determination of nationality claims solely in the hands of the courts of appeal and ... the district courts." *Hughes v. Ashcroft*, 255 F.3d 752, 758 (9th Cir. 2001) (citing 8 U.S.C. § 1421(c)). Thus, the Court of Appeals erred by deferring to the BIA's determination of Petitioner's citizenship rather than reviewing Petitioner's petition *de novo*.

X. IMMIGRATION JURISPRUDENCE AND PUBLIC POLICY SUPPORT KEEPING FAMILIES LIKE PETITIONER'S TOGETHER.

Both the legislative history and the humane purpose and goals of the INA favor keeping the children of immigrants and United States citizens, such as Mr. Martinez-Madera, united with their families. To use the Ninth Circuit's language from *Solis-Espinoza*, a finding that Mr. Martinez-Madera derived United States citizenship when Mr. Gonzalez legitimated him would be "logical" here because "in every practical sense" Mr. Gonzalez was Mr. Martinez-Madera's father, and, just as in *Solis-Espinoza,* there is "no good reason to treat petitioner otherwise." *Solis-Espinoza*, 401 F.3d at 1094.

The legislative history of the INA demonstrates Congress's focus on preserving the family unit. First, the legislative history "clearly indicates" that Congress wished to "keep families of United States citizens and immigrants united" and that the INA "implements the underlying intentions of our immigration laws regarding the preservation of the family unit." *See* H.R. Rep. 85–1199, pt. 2, *reprinted in* 1957 U.S.C.C.A.N. 2016, 2020. Second, the legislative history suggests that Congress specifically planned to preserve relationships where, as here, the citizen parent has "evidenced an intent to regard the illegitimate stepchild of his spouse as part of his own family and to raise that child as a part of the family unit." *See id.* at 2020–21. Third, the legislative history strongly urges a "liberal construction" of the immigration statutes, noting

that "no harm could possibly result from such a construction, and the consequences would fulfill the humane considerations involved in keeping intact the family unit." *See id.*

Circuit courts have long recognized that the humane purpose of the INA is to prevent the separation of families. Accordingly, courts have interpreted the Act's language to facilitate the unification of families. *See, e.g.*, *Kaliski*, 620 F.2d at 216 (explaining "humane purpose" of Act is to prevent continued separation of families and noting that a "strict interpretation" of the Act, including an "arbitrary distinction" between legitimate and illegitimate children, would "detract from . . . the purpose of the Act which is to prevent continued separation of families."). *See also Lau v. Kiley*, 563 F.2d 543, 547 (2d Cir. 1977) (explaining "foremost policy" behind granting citizenship according to family connections is reunification of families); *De Los Santos v. INS*, 690 F.2d 56, 59 (2d Cir. 1982) (holding Act grants preferential status to close relatives of U.S. citizens and permanent residents to facilitate reunification of families). In particular, "citizenship requirements are liberalized for children acquiring United States citizenship through birth abroad to a United States citizen parent." *See Solis-Espinoza*, 401 F.3d at 1094 (*citing* H.R. Rep. No. 85–1199, pt. 2 (1957)) (noting Act was intended to keep families together and that Congress was concerned about keeping families of citizens and immigrants united).

Without question, the INA should be interpreted to preserve "bona fide" family

relationships, such as the relationship between Mr. Martinez-Madera and his family, as contrasted with sham "families" formed only to obtain immigration or other advantages. *See, e.g., Menezes v. INS*, 601 F.2d 1028, 1033 (9th Cir. 1979) (regarding requirement that marital relationship between U.S. citizen and alien be "bona fide and lasting" to allow adjustment of immigration status for alien). *See also Ng Fun Yin v. Esperdy*, 187 F. Supp. 51, 53 (S. D.N.Y. 1960) (granting favorable immigration status to adopted son of married United States citizen and Chinese citizen because Congressional objective of INA is restoration of bona fide family relationship); *Black's Law Dictionary* (8th ed. 2004) (defining "bona fide" as genuine and presented in good faith). Because the IJ concluded that "there is no reason to dispute or disbelieve, that since [Petitioner's] age of 6 months . . . [Petitioner's stepfather] has always held [Petitioner] out to be a son and part of the family," a finding of derivative citizenship in this case is consistent not only with the holdings of *Scales* and *Solis-Espinoza*, but with the legislative purpose of the INA.

CONCLUSION

In conclusion, the claims raised in this petition establish that the Court of Appeals' erred by (1) failing to apply the version of 8 U.S.C. § 1409 in effect at Petitioner's birth in 1953, and thereby imposing a "blood requirement" that Congress did not adopt until the 1986 amendment, (2) judicially legislating a "marriage at birth" requirement into 8 U.S.C. § 1401 that is not supported by the language of the statute, and (3) failing to apply applicable

California law when it determined that Petitioner could not be legitimated by a non-biological parent despite decisions of the California Supreme Court holding that the claims of paternity of a non-biological father will prevail over the competing claim of a biological father so long as the express requirements of the California statute are met. For each of these reasons, and the others discussed herein, the Court should grant certiorari in this case.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUAN JOSE MARTINEZ-MADERA, *Petitioner,* v. ERIC HOLDER, JR., Attorney General *Respondent.*	No. 06-73157 Agency No. A14-647-093 OPINION

On Petition for Review of an Order of the Board of Immigration Appeals

Argued and Submitted
April 17, 2008—San Francisco, California

Filed March 16, 2009

Before: Stephen S. Trott and Sidney R. Thomas, Circuit Judges, and Michael R. Hogan,* District Judge.

Opinion by Judge Trott;
Dissent by Judge Thomas

*The Honorable Michael R. Hogan, United States District Judge for the District of Oregon, sitting by designation.

SUMMARY

Immigration/Removal and Asylum

The court of appeals denied a petition for review. The court held that the Immigration and Nationality Act (INA), 8 U.S.C. § 1401(g), in a derivative citizenship claim, requires at least one of an unnaturalized petitioner's parents to be married to a U.S. citizen at the time of the petitioner's birth.

Petitioner Juan Martinez-Madera, who had been convicted of attempted murder, was placed in removal proceedings as an alien convicted of an aggravated felony. Martinez-Madera contended that he was a United States citizen, although he was born in Mexico of unwed Mexican parents, neither of whom was married to a United States citizen at the time of Martinez-Madera's birth. An immigration judge (IJ) found that Martinez-Madera was not a United States citizen and that he was deportable as an aggravated felon, and ordered him deported. On appeal to the Board of Immigration Appeals (BIA), Martinez-Madera contended that he derived U.S. citizenship when his stepfather allegedly legitimated him as his son in accordance with California's legitimation statute. The BIA dismissed Martinez-Madera's appeal.

Martinez-Madera petitioned for review.

[1] The Ninth Circuit had not yet addressed the scenario where neither of the petitioner's parents

were citizens at the time of his birth, and, as here, the petitioner claims to have derived citizenship under § 1401 when, subsequent to the petitioner's birth, his or her biological non-citizen parent simply married a U.S. citizen. **[2]** The Fifth Circuit has held in a case with similar facts that a person born of unwed Mexican parents in Mexico did not become a United States citizen by virtue of her later adoption by a United States citizen, who was married to neither of her parents at the time of her birth. He could not have been a citizen "at birth."

[3] California's former legitimation statute, California Civil Code § 230 (1872) (since repealed) applies only to fathers legitimating their illegitimate biological children. **[4]** Under § 1409, that path to citizenship would require a blood relationship between a petitioner and his parent, which Martinez-Madera did not have. **[5]** It had to be concluded that Martinez-Madera, born to two unwed non-citizen parents, could not be deemed "born in wedlock" under § 1401. And, because there was no blood relation between Martinez-Madera and his citizen stepfather, he could not meet his burden to prove citizenship under § 1409. Finally, because it was undisputed that he was convicted of attempted murder, it had to be concluded that Martinez-Madera was removable under §§ 1227(a)(2)(A)(iii) and 1101 (a)(43)(U). Martinez-Madera' s petition had to be denied.

Judge Thomas dissented, writing that courts should look to state law to determine whether a person may

properly be considered legitimate or born in wedlock for the purposes of § 1401; under California law, Martinez-Madera was clearly born in wedlock and thus derives United States citizenship from his father.

COUNSEL

Paul S. Jasper, Katherine Morgan, and Katherine A. Sullivan, Leboeuf, Lamb, Greene & MacRae LLP, San Francisco, California, for the petitioner.

Andrew Oliveira. U.S. Department of Justice, Washington, D.C., for the respondent.

OPINION

TROTT, Circuit Judge:

Is an unnaturalized person (1) born in Mexico, (2) to unwed Mexican citizen parents, (3) whose mother later married in Mexico a United States citizen, who treats that person as his son, and (4) who with his family moves to the United States, a citizen of the United States? The answer according to the law is "no."

I

OVERVIEW

Juan Jose Martinez-Madera petitions for review of a decision of the Board of Immigration Appeals ("BIA"), dismissing his appeal from a final order of deportation. Petitioner contends he is a United States citizen by virtue of his stepfather's United States citizenship and therefore is not deportable under § 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an aggravated felony. We have jurisdiction under 8 U.S.C. § 1252(b)(5)(A), and must determine whether INA § 301(g), 8 U.S.C. § 1401(g) requires at least one of a person's parents to be married to a U.S. citizen at the time of the petitioner's birth. We hold that it does, and so deny the petition.

II

BACKGROUND

Petitioner was born in Mexico in January 1953. His biological parents were both Mexican citizens and were never married. Six months after Petitioner was born, his mother Thomasa Madera ("Madera") met and began a relationship with Jesus Gonzalez ("Gonzales"), a United States citizen.

The couple married in February 1960 and, in December 1965 moved with Petitioner and his half-siblings to California. Petitioner has lived there ever

since. The record does not contradict Petitioner's assertion that since he was six months old, Gonzalez has held Petitioner out and treated him as his son. However, Gonzalez never legally adopted Petitioner. Petitioner's mother became a naturalized citizen in 1995. By that time, Petitioner was forty-three years old. There is no evidence Petitioner made any effort to become naturalized.

In October 1996, Petitioner pled nolo contendere to attempted murder under circumstances that involved domestic violence with a firearm. He served an enhanced eight-year criminal sentence. He was released on September 22, 2005. On September 8, 2005, removal proceedings were initiated against Petitioner on the ground that he was deportable as an aggravated felon under INA § 237(a)(2)(A)(iii). After a merits hearing, the Immigration Judge found that Petitioner was not a U.S. citizen and that the government had proven by clear and convincing evidence that he was deportable as an aggravated felon.

On appeal to the BIA, Petitioner argued that he derived U.S. citizenship when his stepfather, Gonzalez, allegedly legitimated him as his son "in accordance with California's legitimation statute." The BIA reviewed Petitioner's case de novo and dismissed his appeal. After reviewing the facts, the relevant statutory framework, and our decisions in *Scales v. I.N.S.*, 232 F.3d 1159 (9th Cir. 2000), and *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005), the BIA concluded that Petitioner had not

carried his burden to establish U.S. citizenship. The BIA provided a thoughtful analysis of Petitioner's argument:

> The court's decision in *Scales v. INS*, involved a child who was born to a non-citizen woman who was married at the time of the child's birth to a United States citizen. That man accepted the child and acted as his father, even though he was not the biological father of the child. The court observed in *Scales* that while the "blood relationship" requirement in 8 U.S.C. § 1409 applied to an illegitimate child, the requirement applied *only* to an illegitimate child and that it did not apply to someone who was not born "out of wedlock." The court determined that the respondent in that case was not illegitimate, since he was "born to parents who were married at the time of his birth," even though the husband in that married couple was not the child's biological father. Thus, the court concluded that § 1409 did not apply to him, and then determined that the respondent qualified for United States citizenship under § 1401, despite the lack of a blood relationship between the child and the United States citizen parent, since the statute did not require a blood relationship for citizenship, other than the requirement under § 1409 applicable only to a child born out of

wedlock. The court further recognized in *Solis-Espinoza v. Gonzales*, that there should be no distinction on the issue of legitimation, where an individual such as the respondent in the case before us, who was acknowledged and accepted into the family by the mother's United States citizen husband, and was otherwise treated as if he were a legitimate child, and adopted as such; and the situation in *Scales v. INS*, where the father of an illegitimate child acknowledges and with the consent of the United States citizen spouse, brings the child into the family; and concluded that public policy dictates that in both instances such child is deemed for all purposes legitimate from the time of its birth.

However, notwithstanding the foregoing discussion, we find the respondent does not benefit from the Ninth Circuit decisions in either *Solis-Espinoza v. Gonzales*, or *Scales v. INS*. As noted above, in both *Solis-Espinoza* and *Scales*, the court found that there was an existing marital relationship between one of the biological parents and the stepparent at the time the child was born so that the child was not considered to be illegitimate or born out of wedlock and was therefore not barred from establishing citizenship under 8 U.S.C. § 1401(g). In

> contrast, in the respondent's case, the respondent's natural parents were both unmarried and Mexican citizens at the time of the respondent's birth, and the respondent's mother did not marry his United States citizen stepfather until 1960 seven years after he was born. Consequently he may not benefit from those decisions.

(Internal citations omitted). The BIA thus concluded that Petitioner was not entitled to derivative citizenship and was therefore removable as an aggravated felon under INA § 237(a)(2)(A)(iii) and 8 U.S.C. § 1101(a)(43)(U). We agree.

III

DISCUSSION

Standard of Review

We review de novo a claim of citizenship. *Solis-Espinoza,* 401 F.3d at 1092. Because the B1A's review was de novo, our "review is limited to the decision of the B1A." *Scales,* 232 F.3d at 1162.

Analysis

"There are 'two sources of citizenship, and two only: birth and naturalization.' "*Miller v. Albright*, 523 U.S. 420, 423 (1998) (citing *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898). "Evidence of foreign birth . . . gives rise to a rebuttable presumption of alienage, and the burden then shifts to the petitioner to prove citizenship." *Scales*, 232 F.3d at 1163. "'The applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth.' " *Id.* at 1162 (citing *United States v. Viramontes-Alvarado*, 149 F.3d 912, 915 (9th Cir. 1998)) (quoting *Ablang v. Reno*, *52* F.3d 801, 803 (9th Cir. 1995)) (quoting *Runnett v. Shultz*, 901 F.2d 782, 783 (9th Cir. 1990)).

[1] In both *Scales* and *Solis-Espinoza,*[1] one of the

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[1] The text of 8 U.S.C. § 1401 and 1409 was not amended in any relevant way between 1952 and 1986. Thus, we interpreted the same version of these sections in *Scales*, where the petitioner was born in 1977, and in *Solis-Espinoza*, where the petitioner was born in 1967. *Compare* 232 F.3d at 1161 *and* 401 F.3d at 1091.

Section 1401(a)(7), Nationals and Citizens of the United States at birth, provides in relevant part as follows:

> (a) The following shall be nationals and citizens of the United States at birth:
>
> > . . . [paragraphs (1) through (6)]
> >
> > (7) A person born outside the geographical limits of the United States . . . of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States . . . for a period or periods totaling not less than ten years, . . .

Section 1409 provides in relevant part:

> *Children born out of wedlock*
>
> (a) The provisions of paragraph (c), (d), (e), and (g) of section 1401 of this title, and of paragraph (2) of section 1408 of this title, shall apply as of the date of birth to a person born out of wedlock if—
>
> > (1) a blood relationship between the person and the father is established by clear and convincing evidence,
> >
> > (2) the father had the nationality of the United States at the time of the person's birth,
> >
> > (3) the father (unless deceased) has agreed in writing to provide financial support for the

petitioner's biological parents was married to a U.S. citizen at the time of the petitioner's birth. *See Scales,* 232 F.3d at 1161-62 (biological mother married to citizen stepfather at time of petitioner's birth); *Solis-Espinoza,* 401 F.3d at 1091 (biological father married to citizen stepmother at time of petitioner's birth). We have not yet addressed the scenario where neither of the petitioner's parents were citizens at the time of his birth, and, as here, the petitioner claims to have derived citizenship under § 1401 when, subsequent to the petitioner's birth, his or her biological non-citizen parent simply married a U.S. citizen.

As recognized by the BIA, *Solis-Espinoza* and *Scales,* upon which Petitioner relies, are manifestly distinguishable and thus not controlling. *See* 401 F.3d 1090; 232 F.3d 1159. In each case, the person claiming citizenship was born into a marital relationship *between a citizen* and an alien. In

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person until the person reaches the age of 18 years, and

(4) while the person is under the age of 18 year—

(A) the person is legitimated under the law of the person's residence or domicile,

(B) the father acknowledges paternity of the person in writing under oath, or

(C) the paternity of the person is established by adjudication of a competent court.

8 U.S.C. § 1409(a).

contrast, Martinez-Madera was born in Mexico of unwed Mexican parents, *neither* of whom was married to a United States citizen at the time of Martinez-Madera's birth.

[2] We agree with the Fifth Circuit's resolution of a case with similar facts. In *Marquez-Marquez v. Gonzales,* 455 F.3d 548 (5th Cir. 2006), that court held that a person born of unwed Mexican parents in Mexico did not become a United States citizen by virtue of her later adoption by a United States citizen, who was married to neither of her parents at the time of her birth. Our sister circuit properly distinguished *Scales* and *Solis-Espinoza,* and quoted the following from an unpublished decision of our own circuit: "Crider was born of parents neither of whom were or are citizens of the United States. He could not have been a citizen 'at birth.' There is no conceivable way to place him within the reach of § [1401)." *Id.* at 558-559, & n.22 (quoting *Crider v. Ashcroft,* 74 Fed. Appx. 729-30 (9th Cir. 2003)) (unpublished) (citing *I.N.S. v. Pangilinan,* 486 U.S. 875 (1988)).

Petitioner relies on California's legitimation statute, Cal. Civ. Code § 230 (1872) (since repealed by Stats. 1975, c. 1244, p. 3196, § 8), to support his argument, claiming that under *Solis-Espinoza,* "he, as a legitimate son, was not 'born out of wedlock,' and that because he was not 'born out of wedlock,' *Scales* and *Solis-Espinoza* mandate that he deserves citizenship from his stepfather, Gonzales. We find this argument unconvincing, for two reasons.

[3] First, former Cal. Civ. Code § 230 applies only to fathers legitimating their illegitimate *biological* children. The statute does not apply to stepfathers informally adopting stepchildren. How do we know this? Out of the mouth of the California Supreme Court itself. In *Blythe v. Ayres,* 31 P.915 (Cal. 1892), that court held that former Cal. Civ. Code *§* 230 was a legitimization statute relating to persons "where the blood relation exists." *Id.* at 916. *See also In re Lund's Estate,* 159 P.2d 643, 654 (Cal. 1945) ("[T]here is a natural and basic difference between the adoption of blood strangers and the adoption by legitimation of a natural child." (citing *Blythe,* 31 P. 915)).

Second, Petitioner's authority does not hold that an alien parent who is unmarried at the time of the birth of a person who later claims citizenship may be deemed to have been married to a citizen at the time of birth.

[4] As for § 1409, that path to citizenship would require a blood relationship between Petitioner and Gonzales, which does not exist. As we said in *Scales,* "Moreover, § 1409 clearly was enacted 'at least in part, to ensure that a person born out of wedlock who claims citizenship by birth *actually shares a blood relationship* with an American citizen.'" 232 F.3d at 1164 (quoting *Miller,* 523 U.S. at *435)* (emphasis added). *See also Tuan Anh Nguyen v. I.N.S.,* 533 U.S. 53 (2001) (describing § 1409 as a statute requiring a blood relationship, either by birth or by legitimation). Furthermore, the Board's

determination to this effect is entitled to *Chevron* deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

The dissent claims that "one would be hard-pressed to come up with a logical reason" to explain this result. Beyond those reasons articulated throughout this opinion, we would add only that one would be even more "hard-pressed" to come up with a logical reason to explain the dissent's desired result — that a person born out of the country to two unwed non-citizen parents can derive citizenship "by birth" from a subsequent U.S. citizen stepfather — is not an untenable and paradoxical reading of § 1401's requirement that one be born in wedlock to a U.S. citizen to derive citizenship from that parent.

IV

CONCLUSION

[5] The foregoing leads to the unsurprising conclusion that Petitioner, born to two unwed non-citizen parents, cannot be deemed "born in wedlock" under § 1401. And, because there is no blood relation between Petitioner and Gonzalez, his citizen stepfather, he cannot meet his burden to prove citizenship under § 1409. *See Scales*, 232 F.3d at 1164; *Solis-Espinoza*, 401 F.3d at 1093. Finally, because it is undisputed that he was convicted of attempted murder, we conclude that Petitioner is removable under 8 U.S.C. § 1227(a)(2)(A)(iii) and 1101 (a)(43)(U).

As in the case of *Tuan Anh Nguyen*, Petitioner's blocked path to citizenship is "due to the serious nature of his criminal offense[ ], not. . . to any supposed rigidity or harshness in the citizenship laws." *Id.* at 71. Among other options, the naturalization door was open to him, but he did not elect to pass through it, choosing instead serious antisocial conduct that led him to prison.

Petition DENIED.

THOMAS, Circuit Judge, dissenting:

The majority concludes that a child raised from the age of six months by a non-biological citizen father is not a citizen. Our case law, the governing federal and state statutes, and a proper application of the principles of cooperative federalism compel a different conclusion. Thus, I must respectfully dissent.

I

Juan Jose Martinez-Madera moved to the United States when he was six years old and has now lived here for over forty years. Martinez-Madera's mother began a relationship with Jesus Gonzales, the man Martinez-Madera regards as his father, when Martinez-Madera was an infant. The IJ found it undisputed that "since [Martinez-Madera]'s age of 6 months Mr. Gonzales . . . has held out that [Martinez-Madera] is to be his son and addresses

him and adopted him into the family. . . . He has always held [Martinez-Madera] out to be a son and part of the family." Martinez-Madera's parents had six biological children together between 1954 and 1966. They married in 1960. Throughout his entire childhood, Martinez-Madera lived with his parents and siblings as a family unit. Gonzales provided for the entire family and publicly held himself out as Martinez-Madera's father.

Now, Martinez-Madera claims derivative citizenship through Gonzales, a United States citizen. He cites our cases *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000), and *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005), which establish that a person of foreign birth may derive citizenship through a non-biological U.S. citizen parent under 8 U.S.C. § 1401 (1964), so long as the person was not born "out of wedlock." In both *Scales* and *Solis-Espinoza*, we looked to state law to determine whether the person was born in or out of wedlock.

Under California law, Martinez-Madera was clearly born in wedlock and thus derives United States citizenship from his father. The majority ignores the precedent set by *Scales* and *Solis-Espinoza* and in doing so contradicts established public policy and an express provision of the Immigration and Nationality Act ("INA").

II

In *Scales*, we first had the opportunity to consider whether a person of foreign birth may derive U.S.

citizenship through a non-biological parent. We examined the two relevant statutory provisions — 8 U.SC. § 1401 and 8 U.S.C. § 1409 — and held that § 1401 does not "require a blood relationship between a person born outside the United States and his U.S. citizen parent." 232 F.3d at 1161. We observed that § 1401 applies if the person claiming citizenship was born "in wedlock," while § 1409 applies if the person was born "out of wedlock." Thus, we proceeded to determine whether the petitioner was born in or out of wedlock. To make this determination, we looked to the relevant state law of the petitioner's domicile. Indeed, we recognized that the INA provides that a child can be "legitimated under the law of the child's residence or domicile." *Scales,* 232 F.3d at 1163 (quoting 8 U.SC. § 1101(c)(1) (1976)). We noted that the petitioner and his family had resided in the state of Washington since the petitioner was 11 years old and that Washington state law provided at the time that "[a] man is presumed to be the natural father of a child if: (a) He and the child's natural mother are or have been married to each other and the child is born during the marriage." *Id.* at 1163 and n.7 (quoting Wash. Rev. Code § 26.26.040(1)(a)). Applying this law, we concluded that the petitioner "is 'legitimate' by virtue of his parents being married at the time of his birth," *id.* at 1164, and held "that Petitioner acquired citizenship at birth under § 1401," *id.* at 1166.

In *Solis-Espinoza*, we confronted "a situation much like [that of *Scales*], but with the genders of the parents reversed." 401 F.3d at 1093. As in *Scales*, we looked to state law to determine whether the petitioner was born in or out of wedlock. We observed that "[t]he relevant state of domicile for Solis-Espinoza and his father was California," *id.* at 1093, and thus applied a California state law in effect at the time. That law provided:

> The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time ofits birth.

Cal. Civ. Code § 230 (1872). Applying that statute, we held: "Under the law of California at the relevant time . . . Solis-Espinoza was 'for all purposes legitimate' from the time of his birth. Since he was not 'born out of wedlock,' under our decision in *Scales*. . . he is entitled to be recognized as a citizen under § 1401." *Solis-Espinoza*, 401 F.3d at 1094.

Section 230 applies to Martinez-Madera as well. Martinez-Madera's non-biological father publicly acknowledged and treated Martinez-Madera as his own son since the age of six months. Section 230 therefore requires this Court to treat Martinez-

Madera as legitimate *from the time of his birth.* Thus, § 1409 does not apply and Martinez-Madera derives United States citizenship through his non-biological father pursuant to § 1401.

The majority attempts to distinguish *Scales* and *Solis-Espinoza* on the ground that Martinez-Madera was born "out of wedlock" because his parents were not married at the time of his birth.[1] However, this difference does not vitiate the requirement of *Scales* and *Solis-Espinoza* that we look to state law to determine whether the petitioner is legitimately the child of the citizen parent.

III

In looking to state law, *Scales* and *Solis-Espinoza* adhered to an express provision of the INA. We have previously held:

> Legitimacy is a legal concept, and the law determines whether and under what circumstances a child it has denominated illegitimate may become legitimate. The Immigration and Nationality Act provides that a child who is unmarried and under twenty-one years of age *can be legitimated*

[1] The majority cites a Fifth Circuit case in support of its conclusion. *See Marquez-Marquez v. Gonzales*, 455 F.3d 548 (5th Cir. 2006). Aside from being non-binding on this Court, *Marquez-Marquez* does not explicitly evaluate whether *Marquez-Marquez* was born into wedlock under the relevant state law.

> *under the law of the child's residence or domicile*, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation.

Burgess v. Meese, 802 F.2d 338, 340 (9th Cir. 1986) (emphasis added) (citing 8 U.S.C. § 1101(b)(1)(C) (1983)); *see also Scales*, 232 F.3d at 1163 (quoting an earlier version of the same statute, 8 U.S.C. § 1101(c)(1) (1976), containing identical language).

Congress has expressly provided that a child who is considered "legitimated" under applicable state law is also to be considered "legitimated" for the purposes of immigration law. The majority ignores this express provision.

IV

Denying Martinez-Madera's derivative citizenship claim also contravenes the public policy considerations we have traditionally respected in such cases.

First, as we observed in *Solis-Espinoza*: "Public policy supports recognition and maintenance of a family unit. The INA was intended to keep families together. It should be construed in favor of family units and the acceptance of responsibility by family members." 401 F.3d at 1094. *See also* H.R. Rep.

85-1199, pt. 2, *reprinted in* 1957 U.S.C.C.A.N. 2016, 2021 (the INA "implements the underlying intentions of our immigration laws regarding the preservation of the family unit."). Martinez-Madera lived with his parents and siblings as a family unit throughout his entire childhood and has resided in the United States for over forty years. To deny him derivative citizenship and deport him to Mexico is unjust, illogical, and does nothing to further U.S. immigration policy.

Second, the majority's interpretation violates the principles of cooperative federalism. "Family relations are a traditional area of state concern." *Moore v. Sims*, 442 U.S. 415, 435(1979); *see also H.C. ex rel. Gordon v. Koppel*, 203 F.3d 610, 613 (9th Cir. 2000) (noting the importance of the state interest in family relations). Federal courts have no general jurisdiction over domestic relations, *Ankenbrandt v. Richards*, 504 U.S. 689, 697-701(1992), while "state courts have a special expertise and experience" in family relations, *H.C.*, 203 at 613 (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979)).

The best method of advancing these two policy objectives is to hold—consistent with the INA, *Solis-Espinoza*, and *Scales*—that state law governs determinations of legitimacy.

V

For all of these reasons, I would hold that courts should look to state law to determine whether a person may properly be considered "legitimate" or

"born in wedlock" for the purposes of § 1401. Applying state law, I would hold that Martinez-Madera is "for all purposes legitimate" under Cal. Civ. Code § 230[2] and is entitled to derivative citizenship under § 1401.

Because the majority has concluded otherwise, I must respectfully dissent.

[2] The majority additionally argues that even if California law should determine whether Martinez-Madera was born out of wedlock, he has not met the requirements of Cal. Civ. Code § 230 because that statute is applicable only to biological fathers. This argument relies on dicta from an 1892 California Supreme Court case. Although we normally follow a state supreme court's interpretation of a state statute, California caselaw simply does not answer the question of whether Cal. Civ. Code § 230 permits a step-father to legitimize his wife's biological child. Absent clear direction from the California Supreme Court, which we do not have here, there is no compelling reason to interpret the California statute in the manner suggested by the majority.

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board
of Immigration Appeals

Falls Church, Virginia 22041

File: A14 647 093 - El Centro Date: [May 30, 2006]

In re: JUAN JOSE **MARTINEZ**-MADERA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Victor Yee
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Termination

ORDER:

PER CURIAM. In a decision entered on February 21, 2006, an Immigration Judge found the respondent removable under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), based on his record of conviction. Exh. 2. The Immigration Judge found the

respondent statutorily ineligible for any relief from removal, due to his conviction for an aggravated felony as defined in section 101(a)(43)(U) of the Act, 8 U.S.C. § 1101(a)(43)(U).[1] The Immigration Judge ordered the respondent removed from the United States to Mexico. The respondent appealed.[2] The appeal will be dismissed.

On appeal, the respondent, a 53-year-old native and national of Mexico, alleges that he is entitled to United States citizenship. The respondent concedes that he was born in Mexico on January 27, 1953. The respondent admits that he was born out of wedlock of Mexican parents, but claims that six months after his birth, his mother met his stepfather, a United States citizen, who raised him and claimed him as his son (Tr. at 2526). The respondent contends that he is entitled to United States citizenship on account of his relationship to his stepfather, a United States citizen, and cites to the decisions of the United States Circuit Court of Appeals for the Ninth Circuit, the jurisdiction wherein this case arises, in *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005) (the Court held that respondent was neither illegitimate nor born out of wedlock such that the blood relationship

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[1] The record reflects that on October 26, 1996, the respondent was convicted in the Superior Court of California, County of Santa Clara, for the offense of Attempted Murder, in violation of Section 664(A)/187 of the California Penal Code, and sentenced to 7 years in prison.

[2] The respondent's request to proceed on appeal *in forma pauperis* is granted under 8 C.F.R. § 3.8(c). *See Matter of Chicas*, 19 I&N Dec. 114 (BIA 1984).

requirement set forth in 8 U.S.C. § 1409 does not apply to the respondent so as to bar his claim to United States citizenship), and *Scales v. INS*, 232 F.3d 1159, 1166 (9th Cir. 2000) (the Court held that a blood relationship between a child and a U.S. citizen was not required to establish citizenship under 8 U.S.C. § 1401(g), if the child in question was not born out of wedlock.). The respondent maintains the Immigration Judge erred in not terminating proceedings.

The Ninth Circuit has held that the applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth. *See U.S. v. Viramontes Alvarado*, 149 F.3d 912, 915 (9th Cir. 1998) (quoting *Ablang v. Reno*, 52 F.3d 801, 803 (9th Cir. 1995) and *Runnett v. Shultz*, 901 F.2d 782, 783 (9th Cir. 1990)), *cert. denied*, 525 U.S. 976 (1998). The respondent was born on January 27, 1953. Therefore, we apply the statutes applicable on that date. In 1953, 8 U.S.C. § 1401(a)(7) stated that a person shall be a national and a citizen of the United States at birth who is: born outside of the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years. At that time, Section 1401(g) was applicable, pursuant to 8 U.S.C. § 1409(a), to children born out of wedlock to U.S. citizen fathers "if the paternity of such child is

established while such child is under the age of twenty-one years by legitimation." A child who is unmarried and less than 21 years of age can be legitimated: under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation. 8 U.S.C. § 1101(b)(1)(C).

The court's decision in *Scales v. INS*, *supra*, involved a child who was born to a non-citizen woman who was married at the time of the child's birth to a United States citizen. That man accepted the child and acted as his father, even though he was not the biological father of the child. The court observed in Scales that while the "blood relationship" requirement in 8 U.S.C. § 1409 applied to an illegitimate child, the requirement applied only to an illegitimate child and that it did not apply to someone who was not born "out of wedlock." *Supra* at 1164. The court determined that the respondent in that case was not illegitimate, since he was "born to parents who were married at the time of his birth," even though the husband in that married couple was not the child's biological father. *Id.* Thus, the court concluded that § 1409 did not apply to him, and then determined that the respondent qualified for United States citizenship under § 1401, despite the lack of a blood relationship between the child and the United States citizen parent, since the statute did not require a blood relationship for citizenship, other than the requirement under § 1409

applicable only to a child born out of wedlock. *Id.* The court further recognized in *Solis-Espinoza v. Gonzales*, *supra*, that there should be no distinction on the issue of legitimation, where an individual such as the respondent in the case before us, who was acknowledged and accepted into the family by the mother's United States citizen husband, and was otherwise treated as if he were a legitimate child, and adopted as such; and the situation in *Scales v. INS*, *supra*, where the father of an illegitimate child acknowledges and with the consent of the United States citizen spouse, brings the child into the family; and concluded that public policy dictates that in both instances such child is deemed for all purposes legitimate from the time of its birth. *See Solis-Espinoza v. Gonzales*, *supra* at 1093-1094.

However, notwithstanding the foregoing discussion, we find the respondent does not benefit from the Ninth Circuit decisions in either *Solis-Espinoza v. Gonzales*, *supra*, or *Scales v. INS*, *supra*. As noted above, in both *Solis-Espinoza* and *Scales*, the court found that there was an existing marital relationship between one of the biological parents and the stepparent at the time the child was born so that the child was not considered to be illegitimate or born out of wedlock and was therefore not barred from establishing citizenship under 8 U.S.C. § 1401(g). In contrast, in the respondent's case, the respondent's natural parents were both unmarried and Mexican citizens at the time of the respondent's birth (Tr. at 25-26), and the respondent's mother did not marry his United States citizen stepfather until 1960 (Tr. at 26), seven years after he was born. Consequently, he may not benefit from those

decisions. A person who claims United States citizenship has the burden to establish it. *See Matter of Leyva*, 16 I&N Dec. 118 (BIA 1977); *Matter of Tijerina-Villareal*, 13 I&N Dec. 327 (BIA 1969). The respondent has not sustained his burden.

Finally, with regard to the respondent's appellate constitutional challenges, we note that this Board and the Immigration Judges lack the authority to consider constitutional challenges to the statutes and regulations we administer. *See Matter of Fede*, 20 I&N Dec. 35 (BIA 1989); *see also Matter of Medina*, 19 I&N Dec. 734 (BIA 1988); *Matter of Valdovinos*, 18 I&N Dec. 343 (BIA 1982).

Based on the record before us, we agree with the Immigration Judge that the respondent is subject to removal from the United States based on the respondent's conviction records submitted in this case. *See* section 240(c)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(3)(A). Therefore, the respondent is clearly removable. Moreover, the respondent has failed to establish his eligibility for any other relief from removal.

Accordingly, in view of the foregoing, the appeal is dismissed.

/s

FOR THE BOARD

IMMIGRATION COURT
2409 LA BRUCHERIE ROAD
IMPERIAL, CA 92251

In the Matter of
*S-MARTINEZ-MADERA,
JUAN JOSE
Respondent

Case No.: A14-647-093

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Feb 21, 2006.

This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[✓] The respondent was ordered removed from the United States to [Mexico]
~~or in the alternative to~~

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to
or in the alternative to

[ ] Respondent's application for voluntary departure was granted until _____ upon posting a bond in the amount of $ _____ with an alternate order of removal to

Respondent's application for:

[ ] Asylum was ( ) granted ( ) denied ( ) withdrawn

[ ] Withholding of removal was ( ) granted ( ) denied ( ) withdrawn

[ ] A Waiver under Section _____ was ( ) granted ( ) denied ( ) withdrawn

[ ] Cancellation under Section 240A(a) was ( ) granted ( ) denied ( ) withdrawn

Respondent's application for:

[ ] Cancellation under Section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Cancellation under Section 240A(b)(2) was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Adjustment of Status under Section ___ was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Respondent's application of ( ) witholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____until _____.

[ ] As a condition of admission, respondent is to post a $_____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.
[ ] Other:_____

Date: Feb 21, 2006

/s
DENNIS R. JAMES
Immigration Judge

Appeal Waived/Reserved Appeal Due By: 3-23-2006
[DHS] [Resp]
EC2

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: [P] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN's ATT/REP [P] INS
DATE: [2/21/06] BY: COURT STAFF /s
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

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U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION COURT
Osento, California

File A 14 647 093 February 21, 2006
In the Matter of

JUAN JOSE MARTINEZ-MADERA,	)	IN REMOVAL PROCEEDINGS
	)	
Respondent	)	

CHARGE: Section 237(a)(2)(A)(3)(i) of the Immigration And Nationality Act as amended - and at any time after admission you have been convicted of an aggravated felony as defined in Section 101(a)(43)(U) and Section 101(a)(43)(A) of the Immigration Act - a law relating to murder.

APPLICATIONS FOR RELIEF: None submitted. Motion to terminate based upon a claim to having derived citizenship.

ON BEHALF OF RESPONDENT:	ON BEHALF OF DEPARTMENT OF HOMELAND SECURITY:
Pro se	Victor Yee Assistant Chief Counsel Immigrations and Customs Enforcement 1115 North Imperial Avenue Osento, California 92243

ORAL DECISION OF THE IMMIGRATION JUDGE

The Department of Homeland Security issued the Notice to Appeal charging the above ground of deportability on September 8th, 2005. The document was served upon the respondent that date and subsequently filed with the Immigration Court September 13th, 2004. The respondent was ordered to appear before the Immigration Court and did.

The respondent's first appearance before the Immigration Court, was at the Federal Detention Center Court Osento, California. At that time the respondent was placed under oath to tell the truth in the proceedings.

The respondent confronted his true name as is set forth in the Notice to Appear.

The respondent confirmed that he had in fact received a copy of the Notice to Appear.

The respondent was advised of the allegations filed against him and the charge of deportability. The respondent stated that he understood the allegations and the ground of deportability.

The respondent was advised as to the purpose of the proceeding and why he was in court. The respondent stated that he understood the purpose of the proceeding and why he was in court.

Each of the rights the respondent has were explained to him and he stated that he understood the rights that he has in this proceeding. The respondent was advised that he has a right to examine any document offered to the Court by the Government, that he has a right to question and cross-examine any witness called by the Government and that he has a right to object to the evidence the Government offers to the Court against him. The respondent stated that he understood these rights.

The respondent was advised that he has a right to present evidence on his own behalf, that he has a right to produce documentary evidence for the Court to consider, that he has the right to call witnesses to testify on his behalf and that he has the right to testify himself. The respondent stated that he understood these rights.

The respondent was advised that he has a right to appeal the Court's decision. The respondent stated that he understood this appellate right.

The respondent was advised that he has the right to be represented by an attorney or other

legally qualified representative that he picks out and he pays for at no cost to the United States Government. The respondent stated that he understood this right to be represented.

The respondent confirmed that he had received a list of legal services and the form setting forth his appellate rights.

Counsel had not hired an attorney and did not wish to do so. The respondent gave up his right to be represented by counsel and proceeded speaking on his own behalf.

The Court called upon the respondent to plead to the allegations.

The respondent denied that he is not a citizen or national of the United States.

The respondent denied that he is a native and citizen of Mexico. The respondent testified that he was born in Mexico, that he has a stepfather born in the United States in California, that his mother was born in Mexico and became a citizen by naturalization approximately 10 years after the respondent became age 18.

The respondent admitted that he was legally admitted to the United States at Calexico, California on or about December 22nd, 1965 as a lawful permanent resident.

The respondent admitted that on October 25th, 1996 he was convicted in the Superior Court of California, County of Santa Clara for the offense of

attempted murder in violation of Section 664(A)/187 of the California Penal Code and that for that offense he was sentenced to confinement for a period of seven years.

The respondent was asked if he had filed an appeal on the case and he stated that he did file an appeal, but he dropped pursuing that appeal.

Based upon the respondent's denial to the allegation relating to citizenship in the United States or whether he's a native or citizen of Mexico the Court did not sustain the charge of deportability until that issue is resolved.

The Department of Homeland Security indicated that they had a copy of the respondent's birth certificate, that a biological father is named on the birth certificate and that the father was a citizen of Mexico. The respondent indicated to the Court that he has served 10 years in custody on this conviction.

The respondent testified that his date of birth is January 27th, 1953.

Based upon the conviction that the respondent suffered and the time that he's been in custody the respondent does not statutorily appear to be eligible to cancellation of removal in either of its forms, adjustment of status because he no longer qualifies for the necessary 212(h) waiver to waive the conviction. The respondent likewise is not eligible to be considered for the refugee based claims of withholding under the Immigration Act or asylum

and when questioned regarding Article 3 the Convention Against Torture Deferral of Removal under Article 3. The respondent answered that he did not think he would be tortured if returned to Mexico.

The Court advised the respondent about what it would take to establish eligibility to be considered for deferral under Article 3 of the Convention Against Torture and he was provided with the application, given the opportunity to submit an application if he chose to do so.

The respondent primarily wishes to pursue the fact that he's acquired citizenship through his stepfather, who is a United States citizen.

The matter was continued to give both the Government and the respondent the opportunity to prepare.

At subsequent hearings the Court checked on the update and the matter was finally set for a merits hearing on today's date.

The Government filed with the Court a prehearing submission. That prehearing submission had been received by the respondent and reviewed by the respondent. He acknowledged that it was a correct record of what transpired to him although he disagrees with the outcome in the criminal court. The Government's prehearing submission was admitted into evidence as Exhibit 2.

The respondent on the issue of whether he's a United States citizen or a native and citizen of Mexico submitted a substantial packet of information, well put together, for a pro per represented respondent. The Government had received that packet of information had had an opportunity to review it and had no objection to its admission into evidence as Exhibit 3. It contains a Motion to Terminate Proceedings under the theory that respondent has acquired a derived citizenship through his stepfather, a United States citizen.

The only issue in the case being whether the respondent's subject to removal. Because he's an alien that's been convicted of an aggravated felony brings into focus the issue of whether he's a citizen or national of the United States or a native and citizen of Mexico.

The Court has read and considered the respondent's moving papers. The Court has likewise incorporated into the record by reference United States Court of Appeals decision and *Scales v. INS*, 232 F.3d 1159 and *Eduardo Solese-Espinoza v. Alberto Gonzalez*, 401 F.3d 1090. Those decisions were cited and decided by the Ninth Circuit Court of Appeals in November of 2000 and in March of 2005.

The Court has considered those decisions in arriving at its decision today.

The parties agreed to the following set of facts.

The respondent was born in Mexico in 1953. The respondent's mother, Tomasa Madera, was born

in Mexico and the respondent's biological father was also born in Mexico.

The respondent's biological parents were not married at the time of his birth and in fact never married.

The respondent was born and shortly thereafter at approximately 6 months of age Jesus Gonzalez, not the respondent's biological father, came into his mother's life, they began to develop and have a relationship and continued that relationship for many years.

On February 28th, 1960 Jesus Gonzalez and the respondent's mother, Tomasa Madera, were married. Both parties agreed that based upon the evidence presented by the respondent in Exhibit 3, which there is no reason to dispute or disbelieve, that since respondent's age of 6 months Mr. Gonzalez, a United States citizen, has held out that the respondent is to be his son and addresses him and adopted him into the family although not a legal adoption. He has always held the respondent out to be a son and part of the family.

Keeping in mind these facts, it is the Department of Homeland Security's position that for the respondent to gain United States citizenship under these facts pursuant to Section 309 of the Immigration And Nationality Act that the respondent's biological father must have a blood relationship to the respondent since he was born out of wedlock to a non-citizen father and non-citizen mother.

In essence the Government's assertion is that the respondent was born out of wedlock and to establish a claim for derivative or acquired citizenship the blood relationship is required to be established.

The respondent argues that, that is not necessarily required and cites *Scales v. INS*, 232 F.3d 1159 (9th Cir. November 21st, 2000) and *Solese-Espinoza v. Gonzalez*, 401 F.3d 1090 (9th Cir. March 23rd, 2005).

The Court has had an opportunity to review those two decisions, to review the law in effect at the time.

The applicable law for transmitting citizenship to a child born abroad with one parent is a United States citizen is the statute that was in effect at the time of the child's birth.

In this particular case the facts are clear. Neither of the respondent's biological parents were United States citizens at the time he was born. Granted the respondent's mother became a United States citizen approximately 10 years after he turned age 18.

The respondent's biological parents were not married at the time of his birth and were never married.

The respondent in this case is desiring to acquire citizenship under the theory that Jesus Gonzalez, a United States citizen, came into his life

at approximately 6 months of age, into his mother's life at the same time, established a relationship with her, had children, subsequently married, February 28th, 1960 and incorporated his mother's previous children and the respondent into the marriage as if they were his own children. That there has never been any distinction between the children in the family and that they were all considered to be of the family.

It is the respondent's contention that Mr. Jesus Gonzalez has legitimized him through this representation that he is his son, holding him out to be part of the family and part of the same family structure.

Based upon the facts of this case they are distinguishable from *Solese* and *Scales, supra.*

In both of those cases the reviewing court found that those children were not born out of wedlock.

Therefore there was no requirement for blood relationship to be established.

They found that there was no necessity for biological relationship under the facts of those two cases.

The Court would note that under the California law, as cited by the respondent and cited in *Solese-Espinoza, Supra* California Civil Code Section 320.

Generally speaking when they're talking about the legitimization they're talking about the biological father legitimating a child born out of wedlock.

In considering the Immigration And Nationality Act and the requirement for deriving or acquiring citizenship that is one of the requirements for a child born out of wedlock to a United States citizen father, is that their relationship must be legitimized depending upon the birth of the child at different ages.

As not the case here.

Based upon the review of the law to be applying to the case, the positions of the parties, the Ninth Circuit case cited by the Court, it is this Court's legal opinion that this respondent does not derive citizenship through Jesus Gonzalez, who is not his biological father, but his stepfather who married his mother on February 28th, 1960, well after the respondent's birth in 1953.

The Court finds that the respondent has not overcome the proof that's been submitted that he is an alien.

It's clear from Exhibit 3, it's clear from his admissions that he immigrated to the United States through a petition filed by Jesus Gonzalez. Through his testimony, it's clear that he was born in Mexico and that both of his biological parents were natives and citizens of Mexico.

In this particular case the Court is satisfied by evidence that's clear and convincing that each of the allegations have been proven, that being that the respondent is not a citizen or national of the United States, that he is a native and citizen of Mexico, that he was admitted to the United States as a lawful permanent resident on or about December 22nd, 1965, that the respondent was convicted October 25th, 1996 in the Superior Court of California, the County of Santa Clara, for the offense of attempted murder as charged with the Government in allegation number seven and admitted that for that offense he was sentenced to confinement for a period of seven years. The Court is likewise satisfied based upon the testimony of the respondent that, that conviction is final for Immigration Court purposes.

Having found that each of the allegations have been proven by evidence that's clear and convincing, the respondent's motion to terminate based upon his claim of being a United States citizen is hereby denied.

Based upon the evidence of record the fact that the allegations have all been proven by evidence that's clear and convincing the Court finds the charge of deportability has been sustained by the proper standard. The respondent is subject to removal from the United States as an alien who after admission has been convicted of an aggravated felony as defined in (a) and (u) of 101(a)(43) of the Immigration Act, the law relating to murder.

As previously stated based upon the respondent's answers to questions presented by the

Court, the Court finds that he is not statutorily eligible to be considered for either form of cancellation of removal. He likewise is not eligible for adjustment of status because he no longer qualifies for the 212(h) waiver for the conviction, statutorily ineligible to be considered for asylum, withholding under the Immigration Act and withholding under Article 3 of the Convention Against Torture.

He's statutorily ineligible to be considered for either form of voluntary departure, statutorily ineligible to be considered for Section 212(c) of the Immigration And Nationality Act relief. The Court would note that the respondent was convicted by plea after the passage of AEDPA and the new Immigration Act, but in any event would not qualify even under the Sear decision by the United States Supreme Court because he has served five years or greater in custody on that conviction.

Statutorily ineligible to be considered for a registry under Section 249 and there is no issue in this case of Section 209(c) since he was not admitted under Section 207.

Based upon all of the evidence that's been considered by the Court and the rulings that the Court has made today. The following order issues.

ORDER

The respondent is hereby ordered removed from the United States to Mexico as charged.

/s

Dennis R. James
United States Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before DENNIS R. JAMES in the matter of:

JUAN JOSE S-MARTINEZ-MADERA

A 14 647 093

Osento, California

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s

Tisha Carroll (Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

April 17, 2006
(Completion Date)

[FILED: JUNE 18, 2009]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUAN JOSE MARTINEZ-MADERA, Petitioner, v. ERIC H. HOLDER, JR., Attorney General Respondent.	No. 06-73157 Agency No. A014-647-093 ORDER

Before: TROTT and THOMAS, Circuit Judges, and HOGAN,*, District Judge.

Judges Trott and Hogan have voted to deny the petition for rehearing and Judge Thomas votes to grant.

Judges Trott and Hogan recommend denying the petition for rehearing en banc and Judge Thomas votes to grant.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

*The Honorable Michael R. Hogan, United States District Judge for the District of Oregon, sitting by designation.

INA § 301 (codified as 8 U.S.C. § 1401 (1952))

Sec. 301.

(a) The following shall be nationals and citizens of the United States at birth:

(1) a person born in the United States, and subject to the jurisdiction thereof;

(2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided,* That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(3) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

(4) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(5) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;

(6) a person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States;

(7) a person born outside the geographical limits of the United States and its outlying possessions <u>of parents one of whom is an alien, and the other a citizen of the United States</u> who prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided,* That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a), shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be

continuously physically present in the United State for at least five years: *Provided,* That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

(c) Subsection (b) shall apply to a person born abroad subsequent to May 24, 1934: *Provided, however,* That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this Act, has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this Act, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the nationality Act of 1940, as amended.

8 U.S.C. § 1401 (2009) (last amended in 1994)

The following shall be nationals and citizens of the United States at birth:

(a) a person born in the United States, and subject to the jurisdiction thereof;

(b) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: Provided, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(c) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

(d) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(e) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous

period of one year at any time prior to the birth of such person;

(f) a person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States;

(g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years: Provided, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 1 of the International Organizations Immunities Act (59 Stat. 669; 22 U.S.C. 288) [22 USCS § 288] by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 1 of the International Organizations

Immunities Act [22 USCS § 288], may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date; and

(h) a person born before noon (Eastern Standard Time) May 24, 1934, outside the limits and jurisdiction of the United States of an alien father and a mother who is a citizen of the United States who, prior to the birth of such person, had resided in the United States.

INA § 309 (codified as 8 U.S.C. § 1409 (1952))

Sec. 309

(a) The provisions of paragraphs (3), (4), (5), and (7) of section 301 (a), and of paragraph (2) of section 308, of this title shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this Act, if the paternity of such child is established while such child is under the age of twenty-one years by legitimation.

(b) Except as otherwise provided in section 405, the provisions of section 301 (a) (7) shall apply to a child born out of wedlock on or after January 13, 1941, and prior to the effective date of this Act, as of the date of birth, if the paternity of such child is established before or after the effective date of this Act and while such child is under the age of twenty-one years by legitimation.

(c) Notwithstanding the provision of subsection (a) of this section, a person born, on or after the effective date of this Act, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

8 U.S.C. § 1409 (2009) (last amended in 1988)

(a) The provisions of paragraphs (c), (d), (e), and (g) of section 301 [8 USCS § 1401 (c)-(e), (g)], and of paragraph (2) of section 308 [8 USCS § 1408(2)], shall apply as of the date of birth to a person born out of wedlock if—

(1) a blood relationship between the person and the father is established by clear and convincing evidence ,

(2) the father had the nationality of the United States at the time of the person's birth,

(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and

(4) while the person is under the age of 18 years—

(A) the person is legitimated under the law of the person's residence or domicile

(B) the father acknowledges paternity of the person in writing under oath, or

(C) the paternity of the person is established by adjudication of competent court.

(b) Except as otherwise provide in section 405 [8 USCS § 1401(g)] shall apply to a child born out of wedlock on or after January 13, 1941, and before December 24, 1952, as of the date of birth, if the paternity of such child is established at any time while such child is under the age of twenty-one years by legitimation.

(c) Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1052, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

Cal. Civ. Code § 230, stats 1975, ch. 1244 §8 (repealed 1975)

The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption. [1872.] *5 Cal Jur 3d Appellate Review §§ 537, 578, 582, 589; Cal Jur 2d Adopt § 1, Bast §§ 7, 8, 9, 10, 11, 12; 13, 15, 16; Cal Practice §§ 150:1, 153:1; Witkin Evidence p 577; Summary pp 2419, 2511, 2520, 2521, 3005, 3025, 3147.*

Cal. Fam. Code § 7611(d)

A man is presumed to be the natural father of a child if he meets the conditions provided in Chapter 1 (commencing with Section 7540) or Chapter 3 (commencing with Section 7570) of Part 2 or in any of the following subdivisions:

(a) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court.

(b) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true:

(1) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce.

(2) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

(c) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true:

(1) With his consent, he is named as the child's father on the child's birth certificate.

(2) He is obligated to support the child under a written voluntary promise or by court order.

(d) He receives the child into his home and openly holds out the child as his natural child.

(e) If the child was born and resides in a nation with which the United States engages in an Orderly Departure Program or successor program, he acknowledges that he is the child's father in a declaration under penalty of perjury, as specified in Section 2015.5 of the Code of Civil Procedure. This subdivision shall remain in effect only until January 1, 1997, and on that date shall become inoperative.

(f) The child is in utero after the death of the decedent and the conditions set forth in Section 249.5 of the Probate Code are satisfied.

8 U.S.C. §1252(b)(5)

(b) Requirements for review of orders of removal. With respect to review of an order of removal under subsection (a)(1), the following requirements apply: . . .

(5) Treatment of nationality claims.

(A) Court determination if no issue of fact. If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact. If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28.

(C) Limitation on determination. The petitioner may have such nationality claim decided only as provided in this paragraph.

28 U.S.C. § 2101

(a) A direct appeal to the Supreme Court from any decision under section 1253 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(g) The time for application for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces shall be as prescribed by rules of the Supreme Court.

28 U.S.C. § 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted by upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree
>
> (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Supreme Court, U.S.
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No. 09-346

In the Supreme Court of the United States

JUAN JOSE MARTINEZ-MADERA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a child born abroad to unmarried, alien parents may nevertheless be deemed to have acquired United States citizenship at birth when a United States citizen later marries his mother and treats the child as his own son.

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In the Supreme Court of the United States

No. 09-346

JUAN JOSE MARTINEZ-MADERA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 559 F.3d 937. The opinions of the Board of Immigration Appeals (Pet. App. A24-A29) and the immigration judge (Pet. App. A33-A47) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 2009. A petition for rehearing was denied on June 18, 2009 (Pet. App. A48). The petition for a writ of certiorari was filed on September 15, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under certain circumstances, the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, pro-

vides that a person born outside the geographical limits of the United States and its outlying possessions may acquire United States citizenship at birth. Specifically, when a child is born "of parents one of whom is an alien, and the other a citizen of the United States who prior to the birth of such person, was physically present in the United States or its outlying possessions" for a prescribed period, that person is deemed a national and citizen of the United States at birth. 8 U.S.C. 1401(a)(7) (1952) (current version at 8 U.S.C. 1401(g)).

The INA imposes additional requirements on a child born out of wedlock outside the United States before that child may be deemed to have acquired United States citizenship at birth under 8 U.S.C. 1401. As provided in 1952, a child born out of wedlock abroad could claim citizenship based on his father's United States citizenship only "if the paternity of such child is established while such child is under the age of twenty-one years by legitimation." 8 U.S.C. 1409(a) (1952).

In 1986, Congress amended 8 U.S.C. 1409(a) to allow a child born out of wedlock abroad to unmarried parents to claim citizenship from birth under 8 U.S.C. 1401 only if (1) a "blood relationship between the child and the father is established by clear and convincing evidence"; (2) the father was a United States citizen at time of the child's birth; (3) the father has agreed in writing to support the child financially until he reaches age 18; and (4) before the child turns 18, the father formally acknowledges paternity in any of a number of ways, including legitimating the child under the law of the child's residence or domicile, obtaining an adjudication of paternity by a court, or simply by acknowledging paternity in writing under oath. Immigration and Nationality Act

Amendments of 1986, Pub. L. No. 99-653, § 13, 100 Stat. 3657 (8 U.S.C. 1409(a) (Supp. IV 1986)).

b. From 1872 to 1975, Section 230 of the California Civil Code provided: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, * * * into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth." Cal. Civ. Code § 230 (West 1954) (repealed 1976).

Effective January 1, 1976, California repealed former Section 230 and enacted its version of the Uniform Parentage Act, now codified at Cal. Fam. Code §§ 7600 *et seq.* (West 2004 & Supp. 2009), which provides (as relevant here): "A man is presumed to be the natural father of a child if he * * * receives the child into his home and openly holds out the child as his natural child." *Id.* § 7611(d) (Supp. 2009). The "presumption under Section 7611 is a rebuttable presumption affecting the burden of proof and may be rebutted * * * by clear and convincing evidence." *Id.* § 7612(a).

2. Petitioner was born in Mexico in 1953. Pet. App. A5. His biological mother and father were Mexican citizens, and they were never married. *Ibid.* Later in 1953, petitioner's mother met Jesus Gonzalez, a United States citizen, and began a relationship with him. *Ibid.* In 1960, petitioner's mother and Gonzalez were married, and they moved with the entire family (including several other children of petitioner's mother and Gonzalez) to California in 1965, when petitioner was 12 years old. Pet. 11; Pet. App. A5.

Petitioner was admitted as a lawful permanent resident when he moved to California in 1965. Pet. 11; Pet. App. A36. The entire family lived together with Gonza-

lez in California, and Gonzalez publically identified himself as petitioner's father, though he never legally adopted petitioner. *Id.* at A6, A40. Petitioner's mother later became a naturalized United States citizen in either 1981, *id.* at A36; Pet. 10, or 1995, Pet. App. A6. There is no evidence that petitioner ever attempted to become naturalized. *Ibid.*

3. On October 25, 1996, in the Superior Court of California, County of Santa Clara, petitioner was convicted of attempted murder, for which he served an enhanced eight-year sentence in prison until his release on September 22, 2005. Pet. 8; Pet. App. A6. On September 8, 2005, the Department of Homeland Security commenced removal proceedings against petitioner on the ground that he was removable as an aggravated felon under 8 U.S.C. 1227(a)(2)(A)(iii). Pet. App. A6, A34.

Before an immigration judge (IJ), petitioner conceded that he had been convicted of attempted murder. Pet. App. A36-A37. Nonetheless, petitioner argued that he was not subject to removal because he derived United States citizenship through his stepfather, Gonzalez. *Id.* at A38. Specifically, he argued that Gonzalez had legitimated him under Section 230 of the California Civil Code by receiving him into his family and otherwise treating him as if he were his legitimate child, thereby satisfying the requirements of 8 U.S.C. 1401 and 1409(a). See Pet. App. A41-A42.

Noting that petitioner's biological parents were unmarried, non-United States citizens at the time of his birth, Pet. App. A41, the IJ concluded that petitioner could not derive citizenship through Gonzalez, *id.* at A43. The IJ rejected petitioner's argument that he acquired citizenship on the theory that Gonzalez legitimated him under Section 230, concluding that Section

230 provided only for biological fathers to legitimate their children born out of wedlock. Pet. App. A42-A43.

Petitioner appealed to the Board of Immigration Appeals (BIA), arguing that legitimation under 8 U.S.C. 1409(a) was not limited to the biological father because two Ninth Circuit cases had held that a child may derive citizenship from a United States citizen who is not the child's biological father. Pet. App. A25-A26; see *Scales* v. *INS*, 232 F.3d 1159 (9th Cir. 2000); *Solis-Espinoza* v. *Gonzales*, 401 F.3d 1090 (9th Cir. 2004). On May 30, 2006, the BIA dismissed petitioner's appeal, concluding that petitioner did not derive citizenship from Gonzalez. Pet. App. A24-A29. The BIA distinguished the Ninth Circuit decisions cited by petitioner on the ground that, in each case, one of the child's biological parents was married to the U.S. citizen stepparent at the time of the child's birth. *Id.* at A28. Accordingly, the BIA concluded, the child in each of those cases could acquire citizenship under 8 U.S.C. 1401 because the child was not born out of wedlock. *Ibid.*

4. The court of appeals denied the petition for review of the BIA's decision in a published opinion dated March 16, 2009. Pet. App. A1-A23. The court held that the BIA had correctly distinguished *Scales* and *Solis-Espinoza* because in each of those cases a biological parent was married to a United States citizen at the time of the child's birth. *Id.* at A12-A13. The court of appeals held that petitioner, on the other hand, was born out of wedlock, rejecting petitioner's reliance on Section 230 of the California Civil Code. *Id.* at A13. Section 230, the court held, "applies only to fathers legitimating their illegitimate *biological* children." *Id.* at A14. The court found no authority for the proposition "that an alien parent who is unmarried at the time of the birth of a person

who later claims citizenship may be deemed to have been married to a citizen at the time of birth." *Ibid.* Finally, the court of appeals held that petitioner could not satisfy 8 U.S.C. 1409(a), the provision concerning children born abroad out of wedlock, because petitioner did not have a blood relationship with a United States citizen. Pet. App. A14-A15. Circuit Judge Thomas dissented. *Id.* at A16-A23.

On June 18, 2009, the court of appeals denied the petition for rehearing and rehearing en banc filed by petitioner. Pet. App. A48.

ARGUMENT

1. Petitioner asserts that this Court should grant certiorari due to a number of separate errors allegedly committed by the court of appeals. But those alleged errors, even if petitioner were correct, are not questions of the type justifying review by this Court. For instance, petitioner argues (Pet. 20-25, 35) that the court of appeals' holding contravenes two prior Ninth Circuit decisions regarding 8 U.S.C. 1401 and 1409, but this Court does not exercise certiorari jurisdiction to resolve intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, the only other Ninth Circuit decision to address the specific issue raised here reached the same result, and this Court recently denied the petition for a writ of certiorari seeking review of that decision. See *United States* v. *Marguet-Pillado*, 560 F.3d 1078 (2009), cert. denied, No. 09-6427 (Oct. 13, 2009). Petitioner also contends (Pet. 27-34) that the court of appeals erred in its application of California state parentage law, but this Court does not grant certiorari to address applications of state law, and here the provisions of federal law are ultimately

controlling. Furthermore, petitioner does not allege that the decision below directly conflicts with any decision of this Court or the other courts of appeals, and it does not. To the contrary, as petitioner acknowledges (Pet. 26), the court of appeals agreed with the only other court of appeals decision to address similar issues. Review by this Court therefore is not warranted.

2. Moreover, the decision below is correct. Because petitioner was born out of wedlock abroad to non-citizen parents and did not have a biological connection to the United States citizen stepfather who he contends legitimated him under California state law, he does not qualify for derivative citizenship from birth under 8 U.S.C. 1401 or 1409.

a. Principally, petitioner argues (Pet. 15-20) that the court of appeals erroneously held that Section 1409(a) requires a blood relationship for a United States citizen to legitimate a person born abroad out of wedlock. Petitioner attributes this alleged error to the court of appeals' application of the current version of Section 1409, which "expressly requires a blood relationship where citizenship is being derived via legitimation." Pet. 16; see 8 U.S.C. 1409(a)(1) (requiring that a person born abroad out of wedlock establish "a blood relationship between the person and the father * * * by clear and convincing evidence"). Because the version of Section 1409 in effect at the time of petitioner's birth did not explicitly mention a blood relationship, but instead required only that "the paternity of such child [be] established," 8 U.S.C. 1409(a) (1952), petitioner argues that it did not require a blood relationship and that therefore, under that statute, he could have been legitimated by Gonzalez for citizenship purposes.

Petitioner is incorrect. The court of appeals recognized that it was required to apply the version of the statute in effect at the time of petitioner's birth, and it therefore quoted the current version of Section 1409 only after correctly concluding that it "was not amended in any relevant way between 1952 and 1986." Pet. App. A10-A11 & n.1. Biological paternity was required by Section 1409 both before and after the 1986 amendments; therefore, the amendment in 1986 expressly requiring a blood relationship effected no change in the law that would be relevant to petitioner's claim of citizenship. See *Marguet-Pillado*, 560 F.3d at 1082-1084.[1]

Petitioner mistakenly relies (Pet. 17-19) on this Court's decision in *Miller* v. *Albright*, 523 U.S. 420 (1998), as support for his assertion that the 1952 version of Section 1409 did not require a blood relationship. To the contrary, "a majority of the [J]ustices [in *Miller*] indicated an understanding that our traditions, and the 1952 version of [Section 1409], look to a blood (biological) relationship between the alleged father and the child at birth." *Marguet-Pillado*, 560 F.3d at 1082; see *id.* at 1082-1083 (quoting *Miller*, 523 U.S. at 435-436 (opinion of Stevens, J.), and *id.* at 477-478 (opinion of Breyer, J.)). As Justice Stevens explained, the new language added in 1986 was part of a broader statutory scheme that preserved the biological connection requirement in the former Section 1409, see *Miller*, 523 U.S. at 435-436, and former Section 1409 "offered no *other* means of *proving a biological relationship*" than

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[1] The decision in *Marguet-Pillado* was issued just 11 days after the decision of which petitioner seeks review here. It rejected virtually the same arguments made by a person identically situated to petitioner, and it denied his claim of citizenship. See *Marguet-Pillado*, 560 F.3d at 1082-1084.

by legitimation under state law, *id.* at 435 (emphasis added). In other words, the Court recognized that legitimation is a means of proving that a biological connection exists; it is not, as petitioner mistakenly seems to suggest, a *substitute* for a biological relationship. Cf., *e.g.*, *Quilloin* v. *Walcott*, 434 U.S. 246, 249 (1978) (describing legitimation as the act of the father regarding *his offspring* born out of wedlock); *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972) (discussing the law's recognition of "family relationships unlegitimized by a marriage ceremony" and the prohibition of discrimination against "natural, but illegitimate, children"). Furthermore, the provisions of Section 1401 to which Section 1409 refers all speak in terms of a child "born * * * of" certain classes of parents, at least one of whom is a U.S. citizen. "There can be little doubt that the 'born of' concept generally refers to a blood relationship." *Marquet-Pillado*, 560 F.3d at 1083.

Accordingly, the court of appeals correctly sustained the BIA's conclusion that under both the former and current versions of Section 1409 of the INA, petitioner could not be deemed to have acquired citizenship from birth because he did not share a blood relationship with Gonzalez.[2]

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[2] The court of appeals stated at the outset of its analysis that it would review the BIA's citizenship determination *de novo*. Pet. App. A9. Nevertheless, the court later stated in passing, as further support for its ultimate conclusion, that the BIA's determination that Section 1409(a) required a blood relationship was entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Pet. App. A14-A15. Any apparent inconsistency between these statements, however, does not aid petitioner's case, as his arguments also fail under the more searching *de novo* standard.

b. Petitioner next asserts (Pet. 20-27) that the court of appeals erred by reading a "marriage at birth" requirement into Section 1401, arguing that such a requirement does not appear in the statute and contravenes the two Ninth Circuit decisions petitioner cited to the BIA. See *Scales* v. *INS*, 232 F.3d 1159 (9th Cir. 2000); *Solis-Espinoza* v. *Gonzales*, 401 F.3d 1090 (9th Cir. 2004). But petitioner misreads *Scales* and *Solis-Espinoza* and the reasoning of the decision below in following them. Properly understood in light of the structure of the INA, those decisions compel the court of appeals' conclusion that petitioner may not obtain citizenship under Section 1401 if neither of his parents was married at the time of his birth.

Petitioner may not qualify for citizenship under Section 1401 because he was born out of wedlock. Section 1401 applies to a child born abroad "to parents who are married"; but when the child's "parents are unwed," Section 1409(a) applies. *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 59 (2001) (*Nguyen*); see *Scales*, 232 F.3d at 1164; *Solis-Espinoza*, 401 F.3d at 1093; see also *Marquez-Marquez* v. *Gonzales*, 455 F.3d 548, 558 (5th Cir. 2006). It is undisputed that neither of petitioner's parents was married at the time of his birth, so if he is to qualify for citizenship from birth, he must satisfy the requirements of Section 1409 (which, as explained *supra*, he does not). As the court of appeals correctly recognized (Pet. App. A12-A14), *Scales* and *Solis-Espinoza* rested on the conclusion that, because a biological parent of the petitioner in each of those cases was married to a United States citizen at the time of the petitioner's birth, neither petitioner was deemed to be born out of wedlock; therefore, they could qualify for citizenship from birth under Section 1401, rather

than Section 1409. See *Scales*, 232 F.3d at 1164; *Solis-Espinoza*, 401 F.3d at 1094. Accord *Marguet-Pillado*, 560 F.3d at 1083.

Nevertheless, petitioner argues that under California law, he may retroactively be deemed to have been born in wedlock so long as he is legitimated under California state parentage law. Petitioner is wrong. The requirements of Section 1401 must be satisfied at the time of the birth of the child; subsequent events (such as a later marriage or legitimation under state law) cannot change the circumstances present at the time of the child's birth. Pet. App. A12-A13; see *Marguet-Pillado*, 560 F.3d at 1083-1084; *Marquez-Marquez*, 455 F.3d at 559-560. Legitimation has traditionally been a means by which parents may obtain parental rights over their biological but illegitimate children, and those children may obtain rights of inheritance and succession and avoid becoming wards of the state. *Michael H.* v. *Gerald D.*, 491 U.S. 110, 124-126 (1989) (plurality opinion). But state legitimation law has never been thought to create a fiction that the child was retroactively born in wedlock for U.S. citizenship purposes.

It is true that *Solis-Espinoza* referred to Cal. Civ. Code § 230 (West 1954) in the course of determining that the petitioner there was not born out of wedlock. See 401 F.3d at 1093-1094. But as courts have later recognized, that holding was likely based in larger part on the fact that the petitioner's biological father was married to the petitioner's United States citizen stepmother when the petitioner was born. See *Marguet-Pillado*, 560 F.3d at 1083; *Marquez-Marquez*, 455 F.3d at 559. Most critically there, "the circumstances described by [Section 1401 were] met *at birth*." *Marquez-Marquez*, 455 F.3d at 559 (emphasis in original); see *Nguyen*, 533 U.S.

at 68 (recognizing that "the moment of birth" is the "critical event in the statutory scheme and in the whole tradition of citizenship law"). As the court of appeals recognized (Pet. App. A15), it would be strange to think that Congress intended to allow a United States citizen to confer citizenship from birth on a child born abroad to unmarried parents, none of whom the citizen had even *met* at the time of the child's birth, simply by holding the child out as his own at some time during the child's minority.

In any event, any conflict of the court of appeals' decision with the Ninth Circuit's prior decision in *Solis-Espinoza* is an intra-circuit conflict that does not warrant certiorari review. See *Wisniewski*, 353 U.S. at 902. Because a state statute cannot operate retroactively to render petitioner born in wedlock, California parentage law cannot allow petitioner to obtain citizenship under 8 U.S.C. 1401.[3]

c. Finally, petitioner asserts (Pet. 36-38) that the court of appeals erred by not construing the law in his favor because immigration jurisprudence and public policy favor keeping families together. Whatever the application of these principles under various circum-

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[3] Petitioner asserts (Pet. 27-31), for the first time in his petition for a writ of certiorari, that the California Uniform Parentage Act, enacted in 1975, is fully retroactive and thus should apply to his case instead of former Section 230. Although petitioner mentioned the existence of the successor statutes, he did not present this retroactivity argument to the court of appeals or the BIA or argue that the new California statute should apply to his case; thus, it is waived. See *United States* v. *United Foods, Inc.*, 533 U.S. 405, 416-417 (2001). In any event, the new statute (Cal. Fam. Code § 7611 (West Supp. 2009)), which creates only a rebuttable presumption of paternity for evidentiary burden-of-proof purposes, still cannot operate retroactively to render petitioner as born in wedlock for citizenship purposes.

stances in construing the immigration laws, this Court has made clear that determinations of citizenship and naturalization are different—provisions conferring citizenship on persons born outside the United States must be strictly construed. See *INS* v. *Pangilinan*, 486 U.S. 875, 883-884 (1988) (requiring courts' determinations as to citizenship and naturalization "to be performed in strict compliance with the terms of an authorizing statute"). Any generalized public policy or rule of construction cannot overcome the clear import of and limitations in statutes conferring citizenship on aliens born outside the United States.

The decision of the court of appeals is correct, and petitioner has not shown any reason why this Court should exercise its discretionary certiorari jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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